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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1975

OPINIONS OF JUNE 1 (CONCLUDED) THROUGH (IN PART) JUNE 24, 1976

ORDERS OF JUNE 1 THROUGH JUNE 23, 1976

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.

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ROBERT H. BORK, Solicitor General.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1970 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

	Page
Abney *v.* United States	934
Abrevaya *v.* Behar	901
Absentee Delaware Tribe of Okla. Business Comm. *v.* Weeks	933
Acosta *v.* United States	920
Acting Chairman, FTC; Brown & Williamson Tobacco *v.*	911
Acting Comm'r of Social Services of N. Y. *v.* Holley	954
Administrator, EPA *v.* Colorado Pub. Int. Research Group	1
Administrator, EPA *v.* District of Columbia	904
Administrator, EPA *v.* E. I. du Pont de Nemours & Co.	947
Administrator, EPA; E. I. du Pont de Nemours & Co. *v.*	947
Administrator, EPA; Hancock *v.*	167
Administrator, EPA; Va. *ex rel.* Air Pollution Control Bd. *v.*	904
Administrator, EPA; West Penn Power Co. *v.*	947
Administrator, Indiana Dept. of Public Welfare *v.* Bond	905
Administrator, Veterans' Administration; Shea *v.*	952
Agent of S. C. Law Enforcement Div. *v.* Bursey	946
Ag Pro, Inc.; Sakraida *v.*	955
Ahlman *v.* Durbin	949
Air Line Pilots Assn. *v.* Northwest Airlines	942
Aitchison; Berger *v.*	904
Akin *v.* United States	912
Akins *v.* United States	908
Alabama; Belcher *v.*	942
Alabama; Mayola *v.*	933
Alabama; Seeber *v.*	932
Alberti; Estelle *v.*	954
Albright *v.* R. J. Reynolds Tobacco Co.	907
A. L. Burbank & Co. *v.* United States	934
Alcor Aviation, Inc. *v.* Radair, Inc.	949
Alessio *v.* United States	948

	Page
Alexandria Scrap Corp.; Hughes *v.*	794
Algonquin SNG, Inc.; Federal Energy Administration *v.*	548
Allegheny Airlines; Nader *v.*	290
Allen *v.* Lyon	910
Allen *v.* United States	951
American Aluminum Corp. *v.* Federal Trade Comm'n	906
American Can Co.; Bannert *v.*	942
American Public Gas Assn. *v.* Federal Power Comm'n	941
Arizona; Arizona Public Service Co. *v.*	931
Arizona; Environmental Protection Agency *v.*	904
Arizona; Standley *v.*	939
Arizona Public Service Co. *v.* Arizona	931
Arnold *v.* Wainwright	908
Ash *v.* Baker	921
Associated Gas Distributors *v.* Federal Power Comm'n	941
Association. For labor union, see name of trade.	
Atchison, T. & S. F. R. Co. *v.* United States	943
Atkins *v.* United States	944
Attorney General; Fiallo *v.*	919
Attorney General; Rodriguez *v.*	919
Attorney General of Kentucky *v.* Train	167
Attorney General of Michigan; Atwell *v.*	919
Atwell *v.* Kelley	919
Austin *v.* United States	952
Ayers *v.* Cowan	937
Baker; Ash *v.*	921
Ball *v.* Shamblin	940
Bannert *v.* American Can Co.	942
Barfield *v.* United States	938
Bartley; Kremens *v.*	933, 945
Bartos *v.* United States	910
Beaunit Corp.; Deering Milliken Research Corp. *v.*	936
Behar; Abrevaya *v.*	901
Belcher *v.* Alabama	942
Belina *v.* United States	952
Bell *v.* Wainwright	924
Bellew *v.* Gunn	953
Bennett *v.* Oklahoma	940
Benson *v.* United States	923
Benton; Star *v.*	934
Bentz; Mehra *v.*	922
Berger *v.* Aitchison	904
Berríos *v.* Inter American University	942

Page

Bettker *v.* United States 938
Bey *v.* United States 937
Birtle *v.* United States 947
Bishop *v.* Wood 341
Bisping *v.* Virginia 907
Blanton *v.* United States 912
Board of Directors of Federal Credit Bank; McVea *v.* 931
Board of Education of Elizabeth, N. J. *v.* Byrne 931
Board of Optometry of Cal. *v.* Cal. Citizens Action Group .. 916
Board of Public Works of Maryland; Roemer *v.* 736
Board of Trade of Chicago; Lagorio *v.* 950
Board of Trustees of University of Tennessee *v.* Soni 919
Bogatin *v.* Suffolk County Bar Assn. 907
Boire *v.* Pilot Freight Carriers, Inc. 934
Bolton *v.* United States 951
Bonacorsa *v.* United States 935
Bond; Stanton *v.* 905
Boren; Craig *v.* 903
Borough. See name of borough.
Boston Home and School Assn. *v.* Morgan 935
Boston Mayor *v.* Morgan 935
Bottom *v.* United States 937
Boyd *v.* United States 920
Brann; Whitney *v.* 922
Brant *v.* United States 951
Britt; McCollin *v.* 912
Bromberg *v.* Chairman, U. S. Civil Service Comm'n 954
Brooks *v.* Mississippi State Probation and Parole Board 955
Brotherhood. For labor union, see name of trade.
Brown; Environmental Protection Agency *v.* 904
Brown *v.* South Carolina 939
Brown *v.* United States 922
Brown *v.* Wainwright 910
Brown & Williamson Tobacco Corp. *v.* Dixon 911
Bryan *v.* Itasca County 373
Bryan *v.* United States 951
Bryza *v.* United States 912
Buffa *v.* United States 912
Bugliarelli *v.* United States 920
Bullock *v.* Cuyler 939
Burbank & Co. *v.* United States 934
Burleson *v.* Friedli 948
Burns *v.* Hein 904, 945

Page

Burns *v.* Hutchison Nursing Home 945
Burrell *v.* McCray 471, 918
Bursey; Weatherford *v.* 946
Burton *v.* Estelle 910
Butz *v.* Hein 904, 945
Byrne; Board of Education of Elizabeth, N. J. *v.* 931
Cain *v.* United States 938
California; Corto *v.* 916
California; David *v.* 925
California; Fulmor *v.* 925
California *v.* Garcia 911
California; Garduno *v.* 930
California; Gibson *v.* 924
California; Lyon *v.* 930
California; Morgan *v.* 939, 940
California; Nabers *v.* 910
California; Roberts *v.* 940
California; Sahley *v.* 945
California; Slocum *v.* 924
California *v.* Usery 833
California Board of Pharmacy *v.* Terry 913
California Citizens Action Group; Board of Optometry *v.* 916
California Co. *v.* Federal Power Comm'n 941
California *ex rel.* Water Resources Board; EPA *v.* 200
California Governor; Environmental Protection Agency *v.* 904
Campbell *v.* Cousins 937
Campbell; Tabor *v.* 924
Cappaert *v.* United States 128
Carey *v.* Population Services International 918
Carino *v.* Grasso 913
Caro; Simon *v.* 919
Carpenters; Farmer *v.* 903
Carroll *v.* United States 923
Carter *v.* Money Tree Co. 925
Case *v.* Commissioner of Patents and Trademarks 946
Casey *v.* United States 909
Castaneda *v.* Partida 934
Cavanaugh *v.* United States 924
Cepulonis *v.* United States 908
Chaffin *v.* Louisiana 907
Chairman, D. C. Board of Elections; Hechinger *v.* 933
Chairman, N. Y. State Board of Parole; DiGiangiemo *v.* 950
Chairman, U. S. Civil Service Comm'n; Bromberg *v.* 954

Page
Chairman, U. S. Civil Service Comm'n *v.* Mow Sun Wong... 88
Charlotte *v.* Firefighters..... 283
Chavez *v.* State Highway Dept. of New Mexico..... 921
Chavez *v.* United States..... 911
Chesapeake & Ohio R. Co.; United States *v.*..... 500
Chicago *v.* Kenny Construction Co..... 921
Chicago; Robinson *v.*..... 915
Chicano Police Officers Assn.; Stover *v.*..... 944
Chief, D. C. Police Dept.; Geisha House, Inc. *v.*..... 917
Chief of Police of Lebanon *v.* Maynard..... 946
Children's Bureau of New Orleans; Golz *v.*..... 901
Chism; Koehler *v.*..... 912
Cholmondeley; Comm'r of Correctional Serv. of N. Y. *v.*.... 911
Christie-Stewart, Inc.; Paschall *v.*..... 935
Chula Vista Electric Co. *v.* State Bd. of Equalization..... 931
Cities Service Co. *v.* Federal Energy Administration..... 947
Citizens for Community Action; Lockport *v.*..... 918
City. See name of city.
Civic Telecasting Corp. *v.* Federal Communications Comm'n. 949
Civil Aeronautics Board; REA Express, Inc. *v.*..... 906
Civil Service Comm'n of New York *v.* Snead..... 942
Clark *v.* Kansas..... 939
Clark *v.* United States..... 937
Clayton P. Kehoe Towing Co. *v.* United States..... 920
Cohn & Co. *v.* Woolf..... 944
Cole *v.* Illinois..... 950
Collingswood; Ringgold *v.*..... 901
Collins *v.* Iowa..... 948
Collins *v.* United States..... 938, 944
Colorado Public Interest Research Group; Train *v.*..... 1
Colorado River Water Conservation Dist. *v.* United States.. 912
Combs *v.* Texas..... 922
Commissioner; Don E. Williams Co. *v.*..... 919
Commissioner, Chicago Fire Dept. *v.* Muscare..... 954
Commissioner, Iowa Soc. Serv. *v.* Hein..... 904, 945
Commissioner, Iowa Soc. Serv. *v.* Hutchison Nursing Home. 945
Commissioner of Correctional Serv. of N. Y. *v.* Cholmondeley. 911
Commissioner of Correctional Serv. of N. Y. *v.* Mukmuk..... 911
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents and Trademarks; Case *v.*..... 946
Commissioner of Soc. Serv. of New York *v.* Aitchison..... 904
Committee on Character and Fitness; Farnum *v.*..... 943
Commonwealth. See name of Commonwealth.

	Page
Compania Espanola de Petroleos; Nereus Shipping *v*.	936
Conley *v*. Eck	906
Connecticut Governor; Carino *v*.	913
Conway Corp.; Federal Power Comm'n *v*.	271
Cook *v*. United States	909
Cooley *v*. United States	952
Cooper *v*. United States	906
Cornish *v*. United States	937
Corrections Commissioner. See name of commissioner.	
Corto *v*. California	910
Corvallis Sand & Gravel Co. *v*. Oregon *ex rel*. Land Board	932
Corvallis Sand & Gravel Co.; Oregon *ex rel*. Land Board *v*.	932
Cosby *v*. United States	935
Cotroni *v*. United States	906
Counts *v*. United States	923
County. See name of county.	
Cousins; Campbell *v*.	937
Coventry, Inc. *v*. T. Sardelli & Sons, Inc.	920
Cowan; Ayers *v*.	937
Cowsen *v*. United States	906
Craig *v*. Boren	903
Crawford *v*. Security National Bank	942
Crisp; Harrison *v*.	939
Crow Dog *v*. United States	917
Cullinane; Geisha House, Inc. *v*.	917
Cummins; Parker Seal Co. *v*.	902
Cupp; Gill *v*.	950
Cuyler; Bullock *v*.	939
David *v*. California	925
Davis *v*. Davis	943
Davis; Washington *v*.	229
Dawn *v*. Sterling Drug, Inc.	930
Deering Milliken Research Corp. *v*. Beaunit Corp.	936
Delaware Republican State Committee *v*. Redfearn	919
Delaware Tribal Business Committee *v*. Weeks	933
Del Chemical Corp.; Reed *v*.	912
DeLee *v*. Knight	939
DeLoach *v*. United States	909
Department of Soc. Serv. of Iowa *v*. West Height Manor	945
Derrick; Mathias *v*.	918
Diaz; Mathews *v*.	67
DiGiangiemo *v*. Olgiatti	950

	Page
Director, Illinois Dept. of Public Aid *v.* Hernandez	918
Director of Family Services of Missouri *v.* Lewis	902
Director of Finance of Baltimore; Star *v.*	934
Director of penal or correctional institution. See name of director.	
Director, Parking Violations Bur. of N. Y. C.; Keiley *v.*	906
District Attorney of Multnomah County; Film Follies *v.*	913
District Court. See U. S. District Court.	
District Judge. See U. S. District Judge.	
District of Columbia; Train *v.*	904
Ditlow *v.* Pan American World Airways	949
Division of Vocational Rehabilitation of Florida *v.* Thomas	903
Dixon; Brown & Williamson Tobacco Corp. *v.*	911
Dodd; Pearson *v.*	946
Doherty *v.* Morgan	935
Don E. Williams Co. *v.* Commissioner	919
Donnelly Advertising Corp. of Florida *v.* Miami	935
Dowell *v.* United States	920
Doyle *v.* Ohio	610
Duke *v.* United States	952
Dunlap; Tennessee *v.*	312
Dunn *v.* Illinois	950
Dunn *v.* Kapiloff	907
Du Pont de Nemours & Co. *v.* EPA	941
Du Pont de Nemours & Co. *v.* Train	947
Du Pont de Nemours & Co.; Train *v.*	947
Durbin; Ahlman *v.*	949
Duvall *v.* United States	950
Earl *v.* United States	938
East Cleveland; Moore *v.*	946
Eastern Kentucky Welfare Rights Organization *v.* Simon	26
Eastern Kentucky Welfare Rights Organization; Simon *v.*	26
Eastlake *v.* Forest City Enterprises, Inc	668
Eck; Conley *v.*	906
Eckenrod *v.* United States	909
Edwards *v.* Reed	934
Edwards; Shannon *v.*	910
E. I. du Pont de Nemours & Co. *v.* EPA	941
E. I. du Pont de Nemours & Co. *v.* Train	947
E. I. du Pont de Nemours & Co.; Train *v.*	947
Employment Security Comm'n of N. M.; Foodway *v.*	903
Employment Security Comm'n of N. M.; Kimbell, Inc. *v.*	903
Enomoto *v.* U. S. District Court	944

	Page
Enomoto *v.* Wright	944
Environmental Protection Agency *v.* Arizona	904
Environmental Protection Agency *v.* Brown	904
Environmental Protection Agency *v.* Cal. *ex rel.* Water Bd	200
Environmental Protection Agency; E. I. du Pont & Co. *v.*	941
Environmental Protection Agency; Ethyl Corp. *v.*	941
Environmental Protection Agency *v.* Maryland	904
Environmental Protection Agency; Nalco Chemical Co. *v.*	941
Environmental Protection Agency; National Refiners *v.*	941
Equitable Life Assurance Soc.; Sampson *v.*	921
Equitable Life Assurance Soc.; Southeastern Dev. Dist. *v.*	921
Escobar-Ordonez *v.* Immigration and Nat. Service	938
Esser *v.* United States	947
Estelle *v.* Alberti	954
Estelle; Burton *v.*	910
Estelle; Johnson *v.*	953
Estelle *v.* Justice	925
Estelle; Moore *v.*	953
Estelle; Palmer *v.*	940
Estelle; Pilcher *v.*	953
Estelle; Stokes *v.*	953
Estelle; Trusley *v.*	939
Estelle *v.* Williams	954
Ethyl Corp. *v.* Environmental Protection Agency	941
Examining Board of Engineers *v.* Flores de Otero	572
Examining Board of Engineers *v.* Perez Nogueiro	572
Ex parte. See name of party.	
Fahey *v.* Holy Family Hospital	936
Farha; Kansas *v.*	949
Farmer *v.* Carpenters	903
Farnum *v.* Committee on Character and Fitness	943
Federal Communications Comm'n; Civic Telecasting *v.*	949
Federal Energy Administration *v.* Algonquin SNG, Inc	548
Federal Energy Administration; Cities Service Co. *v.*	947
Federal Energy Administration; Marathon Oil Co. *v.*	947
Federal Energy Administration; Texaco Inc. *v.*	941
Federal Power Comm'n; American Public Gas Assn. *v.*	941
Federal Power Comm'n; Associated Gas Distributors *v.*	941
Federal Power Comm'n; California Co. *v.*	941
Federal Power Comm'n *v.* Conway Corp	271
Federal Power Comm'n; Gulf States Utilities Co. *v.*	907
Federal Power Comm'n; Public Service Comm'n of N. Y. *v.*	941
Federal Power Comm'n; Shell Oil Co. *v.*	941

	Page
Federal Power Comm'n; Superior Oil Co. *v.*	941
Federal Trade Comm'n; American Aluminum Corp. *v.*	906
Federal Trade Comm'n; Nat. Comm'n on Egg Nutrition *v.*	919
Felder *v.* Smith	911
Ferguson; Vice *v.*	943
Fernandez; Warriner *v.*	921
Ferris *v.* Illinois	912
Fiallo *v.* Levi	919
Film Follies *v.* Haas	913
Finfrock *v.* United States	948
Firefighters; Charlotte *v.*	283
Fire Officers *v.* Pennsylvania	921
Fleming *v.* Gunn	922
Fletcher *v.* Lewis A. Jammer Co	924
Flint Ridge Development Co. *v.* Scenic Rivers Assn	776
Flores de Otero; Examining Board of Engineers *v.*	572
Florida; Wheeler *v.*	948
Foodway *v.* Employment Security Comm'n of N. M.	903
Ford; Phillips *v.*	949
Ford Motor Co. *v.* Polk	907
Forest City Enterprises, Inc.; Eastlake *v.*	668
Founts *v.* Pogue	925
Fowler *v.* United States	922
Frazier *v.* United States	938
Freund *v.* United States	923
Friedli; Burleson *v.*	948
Frierson *v.* West	936
Fruge *v.* United States	923
Fulmor *v.* California	925
Game Co. *v.* Sterling Drug, Inc	930
Garcia; California *v.*	911
Garduno *v.* California	930
Garner *v.* United States	948
Garton *v.* Northern Pacific R. Co	937
Geisha House, Inc. *v.* Cullinane	917
G. E. M. Corp. *v.* Liquor Control Comm'n	918
General Manager, Tennessee Valley Authority; Seeber *v.*	932
Gene Thomas Cascade Lounge *v.* Liquor Control Comm'n	918
Gentile *v.* United States	936
Georgia; Gregg *v.*	918
Georgia; Tennon *v.*	908
Georgia; Wessner *v.*	910
Gibson *v.* California	924

	Page
Gill *v.* Cupp	950
Glover *v.* United States	951
Golz *v.* Children's Bureau of New Orleans	901
Gonzales *v.* Israel	953
Gonzales *v.* United States	923
Goodman *v.* Lizza & Sons	949
Goodson; Quarles *v.*	942
Gorski; Starr *v.*	940
Gourley *v.* Lewis	902
Goynes; Robinson *v.*	924
Grasso; Carino *v.*	913
Gravina *v.* Switzerland	912
Gray; Preston *v.*	955
Gray; Rilla *v.*	955
Green *v.* Illinois	925
Green *v.* New Mexico	950
Gregg *v.* Georgia	918
Gressette; Morris *v.*	945
Grier; Hohensee *v.*	940
Gross *v.* United States	917
Guerra *v.* United States	909
Guild; White *v.*	915
Gulf States Utilities Co. *v.* Federal Power Comm'n	907
Gunn; Bellew *v.*	953
Gunn; Fleming *v.*	922
Haas; Film Follies *v.*	913
Hampton *v.* Mow Sun Wong	88
Hancock *v.* Train	167
Harbor *v.* United States	908
Harley *v.* United States	938
Harris *v.* Rose	902
Harris *v.* Ulanich	907
Harrison *v.* Crisp	939
Hart *v.* United States	937
Harvey *v.* South Dakota	911
Hayes; McCloud *v.*	907
Hechinger *v.* Martin	933
Hein; Burns *v.*	904, 945
Hein; Butz *v.*	904, 945
Henderson *v.* Morgan	637
Hendricks *v.* United States	923
Hergenrader *v.* United States	923
Hernandez; Trainor *v.*	918

Page

Hicks *v.* United States 930
Hills *v.* Scenic Rivers Assn. of Oklahoma 776
Hinden; Lackawanna Power Squadron *v.* 949
Hinden; United States Power Squadrons *v.* 943
Hinkson; Keiley *v.* 906
Hoffman *v.* Ohio 952
Hohensee *v.* Grier 940
Holder; Knight *v.* 936
Hollander; Lubow *v.* 936
Holley; Toia *v.* 954
Holley *v.* United States 909
Holy Family Hospital; Fahey *v.* 936
Horan *v.* Nealon 939
Hortonville Education Assn.; Hortonville Joint School Dist. *v.* .. 482
Hortonville Joint School Dist. *v.* Hortonville Education Assn. . 482
Houser *v.* Seals 942
Howard University; Richards *v.* 949
Howell *v.* Mississippi State Probation and Parole Board 955
Huffman *v.* Missouri 924
Hughes *v.* Alexandria Scrap Corp 794
Hunter *v.* United States 951
Hurst *v.* United States 902
Hutchison Nursing Home; Burns *v.* 945
Illinois; Cole *v.* 950
Illinois; Dunn *v.* 950
Illinois; Ferris *v.* 912
Illinois; Green *v.* 925
Illinois; Jones *v.* 953
Illinois; Kol *v.* 950
Illinois; Morse *v.* 953
Illinois; Sutherland *v.* 942
Immigration and Nat. Service; Escobar-Ordonez *v.* 938
Ingenito *v.* United States 939
Inter American University; Berríos *v.* 942
International. For labor union, see name of trade.
Iowa; Collins *v.* 948
Iowa; Price *v.* 916
Israel; Gonzales *v.* 953
Itasca County; Bryan *v.* 373
Jackson *v.* United States 923, 951
Jacksonville Business Serv.; United States Gypsum Co. *v.* 921
Jammer Co.; Fletcher *v.* 924
Jewell *v.* United States 951

	Page
Jewish Reconstructionist Synagogue; Roslyn Harbor *v.*	950
Jimmy-Richard Co. *v.* Labor Board	907
Johnson *v.* Estelle	953
Johnson *v.* New York	939
Johnson *v.* O'Connor	921
Johnson *v.* United States	909, 951
Jones *v.* Illinois	953
Jones; Sharpe *v.*	937
Jones *v.* United States	922, 950
Joseph Skilken & Co. *v.* Toledo	945
Juidice *v.* Vail	946
Justice; Estelle *v.*	925
Kansas; Clark *v.*	939
Kansas *v.* Farha	949
Kapiloff; Dunn *v.*	907
Karr *v.* Ohio	936
Kehoe Towing Co. *v.* United States	920
Kehrli *v.* Sprinkle	947
Keiley *v.* Hinkson	906
Kelley; Atwell *v.*	919
Kenny Construction Co.; Chicago *v.*	921
Kentucky; Whiteside *v.*	910
Kerr *v.* U. S. District Court	394
Ketner's Cafeteria; Stiller *v.*	911
Kimbell, Inc. *v.* Employment Security Comm'n of N. M.	903
Kittrell *v.* Rockwall	925
Kleppe *v.* New Mexico	529
Kleppe; Oil Shale Corp. *v.*	949
Kleppe *v.* Weeks	933
Kleppe; Wyoming *v.*	906
Knight; DeLee *v.*	939
Knight *v.* Holder	936
Knight *v.* United States	952
Koehler *v.* Chism	912
Kol *v.* Illinois	950
Konigsberg *v.* Vincent	937
Kremens *v.* Bartley	933, 945
Labor Board; Jimmy-Richard Co. *v.*	907
Labor Board; McCorvey Sheet Metal Works *v.*	920
Labor Union. See name of trade.	
Lackawanna Power Squadron *v.* Hinden	949
Lagorio *v.* Board of Trade of Chicago	950
Lambertson *v.* United States	921

	Page
Langins *v.* United States	909
Lebron *v.* Secretary of Air Force	905
Lee *v.* Wainwright	910
Levi; Fiallo *v.*	919
Lewis; Gourley *v.*	902
Lewis A. Jammer Co.; Fletcher *v.*	924
Liddy *v.* United States	937
Lindsey *v.* Louisiana through the Sabine River Authority	948
Liquor Control Comm'n of Ohio; G. E. M. Corp. *v.*	918
Liquor Control Comm'n of Ohio; Thomas Cascade Lounge *v.*	918
Lizza & Sons; Goodman *v.*	949
Local. For labor union, see name of trade.	
Lockport *v.* Citizens for Community Action	918
Lohr; Webb *v.*	931
Longshoremen *v.* Paramount Transport Systems	908
Louisiana; Chaffin *v.*	907
Louisiana; Texas *v.*	465
Louisiana through the Sabine River Authority; Lindsey *v.*	948
Louisville & Nashville R. Co.; Ralston Purina Co. *v.*	476
Lovell *v.* United States	922
Lubow *v.* Hollander	936
Ludwig; Massachusetts Mutual Life Insurance Co. *v.*	479
Lyon; Allen *v.*	910
Lyon *v.* California	930
MacCollom; United States *v.*	317
Madison Joint School Dist. *v.* Wisconsin Emp. Rel. Comm'n.	903
Maher *v.* New Orleans	905
Maine *v.* New Hampshire	660
Maine; New Hampshire *v.*	363
Marathon Oil Co. *v.* Federal Energy Administration	947
Marshall *v.* United States	923
Marshall Field & Co. *v.* Shoup	954
Martin; Hechinger *v.*	933
Maryland; Environmental Protection Agency *v.*	904
Massachusetts Mutual Life Insurance Co. *v.* Ludwig	479
Masterson *v.* United States	908
Mathews *v.* Diaz	67
Mathews *v.* Sanders	905
Mathews; Stevenson *v.*	954
Mathias *v.* Derrick	918
Matthews *v.* United States	951
Mayes *v.* United States	951
Maynard; Wooley *v.*	946

209-904 O - 78 - 2

	Page
Mayola *v.* Alabama	933
McCloud *v.* Hayes	907
McCollin *v.* Britt	912
McCorvey Sheet Metal Works *v.* Labor Board	920
McCrane *v.* United States	906
McCray; Burrell *v.*	471, 918
McDonough *v.* Morgan	935
McGrath *v.* Vinzant	902
McNeal; Vorbeck *v.*	943
McVea *v.* Board of Directors of Federal Credit Bank	931
Meachum; Riggins *v.*	925
Meadows *v.* Michigan	954
Mehra *v.* Bentz	922
Melonson *v.* Wainwright	925
Meyer *v.* United States	948
Miami; Donnelly Advertising Corp. of Florida *v.*	935
Michigan; Meadows *v.*	954
Milivojevich; Serbian Eastern Orthodox Diocese *v.*	696
Millanes-Ruiz *v.* United States	953
Miller *v.* South Carolina	910
Miller *v.* United States	924
Milroy *v.* United States	924
Minnesota; Walker *v.*	950
Miranda *v.* United States	923
Mississippi State Probation and Parole Board; Brooks *v.*	955
Mississippi State Probation and Parole Board; Howell *v.*	955
Missouri; Huffman *v.*	924
Missouri; Mudgett *v.*	910
Mitchell *v.* New Hampshire	940
Mitchell *v.* New York	953
Mobil Oil Corp.; Oil Workers *v.*	407
Mones *v.* United States	909
Money Tree Co.; Carter *v.*	925
Montgomery *v.* United States	908
Moore *v.* East Cleveland	946
Moore *v.* Estelle	953
Moore *v.* Ohio State Bar Assn.	924
Morgan; Boston Home and School Assn. *v.*	935
Morgan *v.* California	939, 940
Morgan; Doherty *v.*	935
Morgan; Henderson *v.*	637
Morgan; McDonough *v.*	935
Morgan; White *v.*	935

Page
Morris *v.* Gressette 945
Morse *v.* Illinois 953
Moses *v.* United States 920
Motley; Negron *v.* 910
Mow Sun Wong; Hampton *v.* 88
Mudgett *v.* Missouri 910
Mukmuk; Commissioner of Correctional Services of N. Y. *v.* .. 911
Mules *v.* United States 948
Muscare; Quinn *v.* 954
Muse *v.* United States 909
Nabers *v.* California 910
Nader *v.* Allegheny Airlines 290
Nalco Chemical Co. *v.* EPA 941
National Comm'n on Egg Nutrition *v.* Fed. Trade Comm'n .. 919
National Labor Relations Board. See Labor Board.
National League of Cities *v.* Usery 833
National Petroleum Refiners Assn. *v.* EPA 941
Nealon; Horan *v.* 939
Nebraskans for Independent Banking; Omaha Nat. Bank *v.* .. 310
Negron *v.* Motley 910
Nelson *v.* United States 922
Nereus Shipping *v.* Compania Espanola de Petroleos 936
Nevada *ex rel.* Westergard *v.* United States 128
New Hampshire *v.* Maine 363
New Hampshire; Maine *v.* 660
New Hampshire; Mitchell *v.* 940
New Jersey; Pennsylvania *v.* 660
New Jersey; Philadelphia *v.* 933
New Jersey; Vance *v.* 935
New Jersey Governor; Board of Ed. of Elizabeth, N. J. *v.* 931
New Mexico; Green *v.* 950
New Mexico; Kleppe *v.* 529
New Orleans; Maher *v.* 905
New York; Johnson *v.* 939
New York; Mitchell *v.* 953
New York Governor *v.* Population Services International ... 918
Nickels *v.* United States 911
Nims *v.* United States 934
Northern Pacific R. Co.; Garton *v.* 937
Northway, Inc.; TSC Industries, Inc. *v.* 438
Northwest Airlines; Air Line Pilots Assn. *v.* 942
Oaks *v.* United States 952
O'Connor; Johnson *v.* 921

	Page
Ohio; Doyle *v.*	610
Ohio; Hoffman *v.*	952
Ohio; Karr *v.*	936
Ohio; Roberts *v.*	949
Ohio; Wood *v.*	610
Ohio State Bar Assn.; Moore *v.*	924
Oil Shale Corp. *v.* Kleppe	949
Oil Workers *v.* Mobil Oil Corp.	407
Oklahoma; Bennett *v.*	940
Oklahoma Governor; Craig *v.*	903
Olgiatti; DiGiangiemo *v.*	950
Omaha Nat. Bank *v.* Nebraskans for Independent Banking	310
O'Meally *v.* United States	951
Omernick *v.* Wisconsin	954
Oregon *ex rel.* Land Board *v.* Corvallis Sand & Gravel Co.	932
Oregon *ex rel.* Land Board; Corvallis Sand & Gravel Co. *v.*	932
Palmer *v.* Estelle	940
Palmore; Superior Court of District of Columbia *v.*	932
Pan American World Airways; Ditlow *v.*	949
Paramount Transport Systems; Longshoremen *v.*	908
Parker Seal Co. *v.* Cummins	902
Partida; Castaneda *v.*	934
Paschall *v.* Christie-Stewart, Inc.	935
Patrick *v.* United States	951
Pearson *v.* Dodd	946
Pena *v.* United States	949
Penn *v.* Rumsfeld	934
Penn Central Transp. Co.; Peoria & Eastern R. Co. *v.*	921
Pennsylvania; Fire Officers *v.*	921
Pennsylvania *v.* New Jersey	660
Pennsylvania; Treftz *v.*	940
Peoria & Eastern R. Co. *v.* Penn Central Transp. Co.	921
Pepi, Inc. *v.* Pitchford	935
Pepi, Inc.; Pitchford *v.*	935
Perez Nogueiro; Examining Board of Engineers *v.*	572
Perkins *v.* Smith	913
Peters *v.* United States	951
Philadelphia *v.* New Jersey	933
Phillips *v.* Ford	949
Phillips *v.* United States	939
Pierro *v.* United States	920
Pike *v.* United States	906
Pilcher *v.* Estelle	953

	Page
Pilot Freight Carriers, Inc.; Boire *v.*	934
Pipkins *v.* United States	952
Pitchford *v.* Pepi, Inc	935
Pitchford; Pepi, Inc. *v.*	935
Place *v.* Weinberger	932
Poff *v.* United States	951
Pogue; Founts *v.*	925
Poindexter *v.* Texas	901
Polk; Ford Motor Co. *v.*	907
Pope *v.* United States	938
Population Services International; Carey *v.*	918
President of the United States; Phillips *v.*	949
President Pro Tem, South Carolina Senate; Morris *v.*	945
Pressley; Swain *v.*	932
Preston *v.* Gray	955
Price *v.* Iowa	916
Public Service Comm'n of N. Y. *v.* Federal Power Comm'n.	941
Quarles *v.* Goodson	942
Quinn *v.* Muscare	954
Radair, Inc.; Alcor Aviation, Inc. *v.*	949
Radzanower *v.* Touche Ross & Co	148
Rajewski *v.* United States	908
Ralston Purina Co. *v.* Louisville & Nashville R. Co	476
Ramos; U. S. Civil Service Comm'n *v.*	916
Raymond *v.* United States	952
REA Express, Inc. *v.* Civil Aeronautics Board	906
Redfearn; Delaware Republican State Committee *v.*	919
Reed *v.* Del Chemical Corp	912
Reed; Edwards *v.*	934
Reese *v.* United States	950
Regional Director, NLRB *v.* Pilot Freight Carriers, Inc.	934
Reynolds Tobacco Co.; Albright *v.*	907
Rice *v.* United States	952
Richards *v.* Howard University	949
Riggins *v.* Meachum	925
Riggs; Zarkos *v.*	948
Riley *v.* Stephens	950
Rilla *v.* Gray	955
Ringgold *v.* Collingswood	901
R. J. Reynolds Tobacco Co.; Albright *v.*	907
Roberts *v.* California	940
Roberts *v.* Ohio	949
Robinson *v.* Chicago	915

	Page
Robinson *v.* Goynes	924
Rocha *v.* United States	923
Rochelle *v.* United States	948
Rockwall; Kittrell *v.*	925
Rodriguez *v.* Levi	919
Rodriguez *v.* United States	955
Roeder *v.* United States	905
Roemer *v.* Board of Public Works of Maryland	736
Rose; Harris *v.*	902
Roslyn Harbor *v.* Jewish Reconstructionist Synagogue	950
Ross & Co.; Radzanower *v.*	148
Roudebush; Shea *v.*	952
Rumsfeld; Penn *v.*	934
Russo *v.* United States	906
Sabine River Authority; Lindsey *v.*	948
Sahley *v.* California	945
Sakraida *v.* Ag Pro, Inc.	955
Salone *v.* United States	917
Sampson *v.* Equitable Life Assurance Society	921
Sanders; Mathews *v.*	905
Sandoval *v.* United States	938, 952
Sarah Coventry, Inc. *v.* T. Sardelli & Sons, Inc.	920
Sardelli & Sons, Inc.; Sarah Coventry, Inc. *v.*	920
Scenic Rivers Assn. of Oklahoma; Flint Ridge Dev. Co. *v.*	776
Scenic Rivers Assn. of Oklahoma; Hills *v.*	776
Schifter *v.* United States	920
S. D. Cohn & Co. *v.* Woolf	944
Seals; Houser *v.*	942
Secretary of Agriculture *v.* Hein	904, 945
Secretary of Air Force; Edwards *v.*	934
Secretary of Air Force; Lebron *v.*	905
Secretary of Defense; Penn *v.*	934
Secretary of Health, Education, and Welfare *v.* Diaz	67
Secretary of Health, Education, and Welfare; Place *v.*	932
Secretary of Health, Education, and Welfare *v.* Sanders	905
Secretary of HUD *v.* Scenic Rivers Assn. of Oklahoma	776
Secretary of Interior *v.* New Mexico	529
Secretary of Interior; Oil Shale Corp. *v.*	949
Secretary of Interior *v.* Weeks	933
Secretary of Interior; Wyoming *v.*	906
Secretary of Labor; California *v.*	833
Secretary of Labor; National League of Cities *v.*	833
Secretary of Transp. of Md. *v.* Alexandria Scrap Corp.	794

Page

Secretary of Treasury *v.* Caro 919
Secretary of Treasury *v.* Eastern Ky. Welfare Rights Org.. 26
Secretary of Treasury; Eastern Ky. Welfare Rights Org. *v.*.. 26
Securities and Exchange Comm'n; Sloan *v.* 935
Securities Investor Protection Corp.; Trustees *v.* 936
Security National Bank; Crawford *v.* 942
Seeber *v.* Alabama 932
Serbian Eastern Orthodox Diocese *v.* Milivojevich 696
Shamblin; Ball *v.* 940
Shannon *v.* Edwards 910
Shariff *v.* United States 922
Sharpe *v.* Jones 937
Shea *v.* Roudebush 952
Shell Oil Co. *v.* Federal Power Comm'n 941
Shoup; Marshall Field & Co. *v.* 954
Silva-Gomez *v.* United States 909
Simon *v.* Caro 919
Simon *v.* Eastern Kentucky Welfare Rights Organization.... 26
Simon; Eastern Kentucky Welfare Rights Organization *v.*... 26
Simpson *v.* United States 922
Sinclair *v.* Williams 936
Skilken & Co. *v.* Toledo 945
Skonieczka; Tyczkowski *v.* 953
Sloan *v.* Securities and Exchange Comm'n 935
Slocum *v.* California 924
Smith; Felder *v.* 911
Smith; Perkins *v.* 913
Smith *v.* Troyan 934
Smith *v.* United States 938, 946
Snead; Civil Service Comm'n of New York *v.* 942
Soni; Board of Trustees of University of Tennessee *v.* 919
South Carolina; Brown *v.* 939
South Carolina; Miller *v.* 910
South Carolina Governor; Frierson *v.* 936
South Dakota; Harvey *v.* 911
Southeastern Industrial Dev. Dist. *v.* Equitable Life Assur... 921
Sperling; United States *v.* 919
Sprinkle; Kehrli *v.* 947
Standley *v.* Arizona 939
Stanton *v.* Bond 905
Star *v.* Benton 934
Starr *v.* Gorski 940
State. See name of State.

	Page
State Bd. of Equalization of Cal.; Chula Vista Co. *v.*	931
State Highway Dept. of New Mexico; Chavez *v.*	921
State Land Board *v.* Corvallis Sand & Gravel Co.	932
State Land Board; Corvallis Sand & Gravel Co. *v.*	932
State Water Resources Control Board; EPA *v.*	200
Stephens; Riley *v.*	950
Sterling Drug, Inc.; Dawn *v.*	930
Sterling Drug, Inc.; Game Co. *v.*	930
Stern *v.* United States	954
Stevenson *v.* Mathews	954
Stewart *v.* United States	922
Stiller *v.* Ketner's Cafeteria	911
Stokes *v.* Estelle	953
Stover *v.* Chicano Police Officers Assn.	944
Suffolk County Bar Assn.; Bogatin *v.*	907
Sun Wong; Hampton *v.*	88
Superintendent of penal or correctional institution. See name or state title of superintendent.	
Superior Court of Arizona; White *v.*	940
Superior Court of California; Zarkos *v.*	948
Superior Court of District of Columbia *v.* Palmore	932
Superior Oil Co. *v.* Federal Power Comm'n	941
Sutherland *v.* Illinois	942
Swain *v.* Pressley	932
Switzerland; Gravina *v.*	912
Tabor *v.* Campbell	924
Tanker Hygrade No. 18, Inc. *v.* United States	920
Tennessee *v.* Dunlap	312
Tennon *v.* Georgia	908
Terry; California Board of Pharmacy *v.*	913
Texaco Inc. *v.* Federal Energy Administration	941
Texas; Combs *v.*	922
Texas *v.* Louisiana	465
Texas; Poindexter *v.*	901
Thomas; Division of Vocational Rehabilitation of Fla. *v.*	903
Thomas Cascade Lounge *v.* Liquor Control Comm'n of Ohio	918
Toia *v.* Holley	954
Toledo; Joseph Skilken & Co. *v.*	945
Touche Ross & Co.; Radzanower *v.*	148
Town. See name of town.	
Train *v.* Colorado Public Interest Research Group	1
Train *v.* District of Columbia	904
Train *v.* E. I. du Pont de Nemours & Co.	947

	Page
Train; E. I. du Pont de Nemours & Co. *v.*	947
Train; Hancock *v.*	167
Train; Virginia *ex rel.* Air Pollution Control Board *v.*	904
Train; West Penn Power Co. *v.*	947
Trainor *v.* Hernandez	918
Treftz *v.* Pennsylvania	940
Troyan; Smith *v.*	934
Trusley *v.* Estelle	939
Trustees of Reading Body Works *v.* Securities Corp.	936
T. Sardelli & Sons, Inc.; Sarah Coventry, Inc. *v.*	920
TSC Industries, Inc. *v.* Northway, Inc.	438
Tyczkowski *v.* Skonieczka	953
Tyler, *Ex parte*	938
Tyler *v.* Vickery	940
Ulanich; Harris *v.*	907
Union. For labor union, see name of trade.	
United. For labor union, see name of trade.	
United States; Abney *v.*	934
United States; Acosta *v.*	920
United States; Akin *v.*	912
United States; Akins *v.*	908
United States; A. L. Burbank & Co. *v.*	934
United States; Alessio *v.*	948
United States; Allen *v.*	951
United States; Atchison, T. & S. F. R. Co. *v.*	943
United States; Atkins *v.*	944
United States; Austin *v.*	952
United States; Barfield *v.*	938
United States; Bartos *v.*	910
United States; Belina *v.*	952
United States; Benson *v.*	923
United States; Bettker *v.*	938
United States; Bey *v.*	937
United States; Birtle *v.*	947
United States; Blanton *v.*	912
United States; Bolton *v.*	951
United States; Bonacorsa *v.*	935
United States; Bottom *v.*	937
United States; Boyd *v.*	920
United States; Brant *v.*	951
United States; Brown *v.*	922
United States; Bryan *v.*	951
United States; Bryza *v.*	912

	Page
United States; Buffa *v*.	912
United States; Bugliarelli *v*.	920
United States; Cain *v*.	938
United States; Cappaert *v*.	128
United States; Carroll *v*.	923
United States; Casey *v*.	909
United States; Cavanaugh *v*.	924
United States; Cepulonis *v*.	908
United States; Chavez *v*.	911
United States *v*. Chesapeake & Ohio R. Co.	500
United States; Clark *v*.	937
United States; Clayton P. Kehoe Towing Co. *v*.	920
United States; Collins *v*.	938, 944
United States; Colorado River Water Conservation Dist. *v*.	912
United States; Cook *v*.	909
United States; Cooley *v*.	952
United States; Cooper *v*.	906
United States; Cornish *v*.	937
United States; Cosby *v*.	935
United States; Cotroni *v*.	906
United States; Counts *v*.	923
United States; Cowsen *v*.	906
United States; Crow Dog *v*.	917
United States; DeLoach *v*.	909
United States; Dowell *v*.	920
United States; Duke *v*.	952
United States; Duvall *v*.	950
United States; Earl *v*.	938
United States; Eckenrod *v*.	909
United States; Esser *v*.	947
United States; Finfrock *v*.	948
United States; Fowler *v*.	922
United States; Frazier *v*.	938
United States; Freund *v*.	923
United States; Fruge *v*.	923
United States; Garner *v*.	948
United States; Gentile *v*.	936
United States; Glover *v*.	951
United States; Gonzales *v*.	923
United States; Gross *v*.	917
United States; Guerra *v*.	909
United States; Harbor *v*.	908
United States; Harley *v*.	938

Page

United States; Hart *v.* ... 937
United States; Hendricks *v.* ... 923
United States; Hergenrader *v.* ... 923
United States; Hicks *v.* ... 930
United States; Holley *v.* ... 909
United States; Hunter *v.* ... 951
United States; Hurst *v.* ... 902
United States; Ingenito *v.* ... 939
United States; Jackson *v.* ... 923, 951
United States; Jewell *v.* ... 951
United States; Johnson *v.* ... 909, 951
United States; Jones *v.* ... 922, 950
United States; Knight *v.* ... 952
United States; Lambertson *v.* ... 921
United States; Langins *v.* ... 909
United States; Liddy *v.* ... 937
United States; Lovell *v.* ... 922
United States *v.* MacCollom ... 317
United States; Marshall *v.* ... 923
United States; Masterson *v.* ... 908
United States; Matthews *v.* ... 951
United States; Mayes *v.* ... 951
United States; McCrane *v.* ... 906
United States; Meyer *v.* ... 948
United States; Millanes-Ruiz *v.* ... 953
United States; Miller *v.* ... 924
United States; Milroy *v.* ... 924
United States; Miranda *v.* ... 923
United States; Mones *v.* ... 909
United States; Montgomery *v.* ... 908
United States; Moses *v.* ... 920
United States; Mules *v.* ... 948
United States; Muse *v.* ... 909
United States; Nelson *v.* ... 922
United States; Nevada *ex rel.* Westergard *v.* ... 128
United States; Nickels *v.* ... 911
United States; Nims *v.* ... 934
United States; Oaks *v.* ... 952
United States; O'Meally *v.* ... 951
United States; Patrick *v.* ... 951
United States; Pena *v.* ... 949
United States; Peters *v.* ... 951
United States; Phillips *v.* ... 939

Page

United States; Pierro *v*..... 920
United States; Pike *v*..... 906
United States; Pipkins *v*..... 952
United States; Poff *v*..... 951
United States; Pope *v*..... 938
United States; Rajewski *v*..... 908
United States; Raymond *v*..... 952
United States; Reese *v*..... 950
United States; Rice *v*..... 952
United States; Rocha *v*..... 923
United States; Rochelle *v*..... 948
United States; Rodriguez *v*..... 955
United States; Roeder *v*..... 905
United States; Russo *v*..... 906
United States; Salone *v*..... 917
United States; Sandoval *v*..... 938, 952
United States; Schifter *v*..... 920
United States; Shariff *v*..... 922
United States; Silva-Gomez *v*..... 909
United States; Simpson *v*..... 922
United States; Smith *v*..... 938, 946
United States *v*. Sperling..... 919
United States; Stern *v*..... 954
United States; Stewart *v*..... 922
United States; Tanker Hygrade No. 18, Inc. *v*..... 920
United States; Urdiales *v*..... 920
United States; Valdez *v*..... 909
United States; Villano *v*..... 953
United States; Vincent *v*..... 919
United States; Warin *v*..... 948
United States *v*. Washington..... 905, 944
United States; Washington *v*..... 905
United States; Westergard *v*..... 128
United States; White *v*..... 922
United States; Williams *v*..... 908
United States; Wilson *v*..... 907
United States; Wimberly *v*..... 922
United States; Wofford *v*..... 937
United States *v*. Wong..... 905
United States; Yavitz *v*..... 903
United States; Zamora *v*..... 952
United States; Zamudio-Aguilar *v*..... 952
U. S. Civil Service Comm'n *v*. Ramos..... 916

Page

U. S. District Court; Enomoto *v.* 944
U. S. District Court; Kerr *v.* 394
U. S. District Judge; Estelle *v.* 925
U. S. District Judge; Houser *v.* 942
U. S. District Judge; Negron *v.* 910
U. S. District Judge *v.* United States 944
U. S. *ex rel.* See name of real party in interest.
United States Gypsum Co. *v.* Jacksonville Business Serv. ... 921
United States Power Squadrons *v.* Hinden 943
Urdiales *v.* United States 920
Usery; California *v.* 833
Usery; National League of Cities *v.* 833
Vail; Juidice *v.* 946
Valdez *v.* United States 909
Vance *v.* New Jersey 935
Vice *v.* Ferguson 943
Vickery; Tyler *v.* 940
Village. See name of village.
Villano *v.* United States 953
Vincent; Konigsberg *v.* 937
Vincent *v.* United States 919
Vinzant; McGrath *v.* 902
Virginia; Bisping *v.* 907
Virginia *ex rel.* Air Pollution Control Board *v.* Train 904
Vorbeck *v.* McNeal 943
Wainwright; Arnold *v.* 908
Wainwright; Bell *v.* 924
Wainwright; Brown *v.* 910
Wainwright; Lee *v.* 910
Wainwright; Melonson *v.* 925
Walker *v.* Minnesota 950
Warden. See name of warden.
Warin *v.* United States 948
Warriner *v.* Fernandez 921
Washington *v.* Davis 229
Washington *v.* United States 905
Washington; United States *v.* 905, 944
Washington, D. C., Mayor *v.* Davis 229
Weatherford *v.* Bursey 946
Webb *v.* Lohr 931
Weeks; Absentee Delaware Tribe of Okla. Business Comm. *v.* . 933
Weeks; Delaware Tribal Business Committee *v.* 933
Weeks; Kleppe *v.* 933

	Page
Weinberger; Place *v.*	932
Wessner *v.* Georgia	910
West; Frierson *v.*	936
Westergard *v.* United States	128
West Height Manor; Department of Soc. Serv. of Iowa *v.*	945
West Penn Power Co. *v.* Train	947
Wheeler *v.* Florida	948
White *v.* Guild	915
White *v.* Morgan	935
White *v.* Superior Court of Arizona	940
White *v.* United States	922
Whiteside *v.* Kentucky	910
Whitney *v.* Brann	922
Williams; Estelle *v.*	954
Williams; Sinclair *v.*	936
Williams *v.* United States	908
Williams *v.* Williams	901
Williams Co. *v.* Commissioner	919
Wilson *v.* United States	907
Wimberly *v.* United States	922
Wisconsin; Omernick *v.*	954
Wisconsin Emp. Rel. Comm'n; Madison Joint School Dist. *v.*	903
Wofford *v.* United States	937
Wong; Hampton *v.*	88
Wong; United States *v.*	905
Wood; Bishop *v.*	341
Wood *v.* Ohio	610
Wooley *v.* Maynard	946
Woolf; S. D. Cohn & Co. *v.*	944
Wright; Enomoto *v.*	944
Wyoming *v.* Kleppe	906
Yavitz *v.* United States	903
Yee *v.* Yee	911
Zamora *v.* United States	952
Zamudio-Aguilar *v.* United States	952
Zarkos *v.* Riggs	948
Zarkos *v.* Superior Court of California	948

TABLE OF CASES CITED

Page

Abbott Labs. v. Gardner, 387 U. S. 136 52
Abington School Dist. v. Schempp, 374 U. S. 203 750, 771, 772
Aetna Life Ins. v. Haworth, 300 U. S. 227 57
Affiliated Ute Citizens v. United States, 406 U. S. 128 447
Akins v. Texas, 325 U. S. 398 239, 241
Alabama v. King & Boozer, 314 U. S. 1 180
Alabama v. Seeber, 502 F. 2d 1238 178, 180, 183, 186, 189–191, 199
Alabama v. Texas, 347 U. S. 272 539, 540
Alaska Pacific Fisheries v. United States, 248 U. S. 78 392
Albemarle Paper Co. v. Moody, 422 U. S. 405 247, 251, 259, 264–267
Alderman v. United States, 394 U. S. 165 627
Alexander v. Louisiana, 405 U. S. 625 239, 241, 244
Algoma Plywood v. Wisconsin Bd., 336 U. S. 301 417, 426, 427
Allen v. Grand Central Aircraft, 347 U. S. 535 264
Alton R. Co. v. United States, 315 U. S. 15 478
American Airlines v. North American Airlines, 351 U. S. 79 300–302
American Ins. Co. v. Canter, 1 Pet. 511 586
American Power Co. v. SEC, 329 U. S. 90 560

Page

Americana of Puerto Rico, Inc. v. Kaplus, 368 F. 2d 431 594
American Yearbook Co. v. Askew, 339 F. Supp. 719 821, 824
Andres v. United States, 333 U. S. 740 581
Anti-Fascist Comm. v. McGrath, 341 U. S. 123 351
Antoine v. Washington, 420 U. S. 194 392
Aptheker v. Secretary of State, 378 U. S. 500 80
Arizona v. California, 372 U. S. 546 138, 139, 141
Armstrong v. United States, 182 U. S. 243 599
Arnett v. Kennedy, 416 U. S. 134 106, 118, 345, 347, 350, 354–361, 494
Arnold v. Ballard, 390 F. Supp. 723 244
Arnold Tours v. Camp, 400 U. S. 45 45
Arrington v. Massachusetts Bay Auth., 306 F. Supp. 1335 269
Arrow Transp. v. Southern R. Co., 372 U. S. 658 512
Askew v. American Waterways Operators, 411 U. S. 325 435
Atkin v. Kansas, 191 U. S. 207 822
Austin v. New Hampshire, 420 U. S. 656 662, 667
Avery v. Georgia, 345 U. S. 559 241
Baker v. Carr, 369 U. S. 186 38, 53, 56, 60
Baker v. Columbus School Dist., 329 F. Supp. 706 269

Page

Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 808, 820, 821, 823, 827, 829
Balzac v. Porto Rico, 258 U. S. 298 540, 591, 600
Bankers Life & Cas. Co. v. Holland, 346 U. S. 379 402, 403
Barlow v. Collins, 397 U. S. 159 45, 54, 56, 58, 60–62, 65, 66
Bell v. Burson, 402 U. S. 535 354
Bell v. Hood, 327 U. S. 678 284
Benner v. Tribbitt, 190 Md. 6 690, 691
Best & Co. v. Maxwell, 311 U. S. 454 810, 820, 827
Bethlehem Steel Co. v. New York Bd., 330 U. S. 767 875
Bibb v. Navajo Freight Lines, 359 U. S. 520 817
Bird v. Sorenson, 16 Utah 2d 1 692
Bivens v. Six Fed. Narcotics Agents, 403 U. S. 388 284
Blair v. California, 340 F. 2d 741 322
Blake v. McClung, 172 U. S. 239 810
Blonder-Tongue Labs. v. University of Ill. Found., 402 U. S. 313 146, 147
Blythe v. Hinckley, 180 U. S. 333 603
Board of Comm'rs v. Seber, 318 U. S. 705 376, 389, 392
Board of Education v. Allen, 392 U. S. 236 746, 747, 749–751, 753
Board of Regents v. Roth, 408 U. S. 564 102, 120, 344, 348, 350, 351, 353, 360, 485, 488
Bode v. Barrett, 344 U. S. 583 827
Bolling v. Sharpe, 347 U. S. 497 100, 119, 239, 601
Borough. See name of borough.
Botany Mills v. United States, 278 U. S. 282 321
Bouldin v. Alexander, 15 Wall. 131 729, 732, 735

Page

Boykin v. Alabama, 395 U. S. 238 650, 651, 653, 654
Bradfield v. Roberts, 175 U. S. 291 746
Brady v. United States, 397 U. S. 742 648, 651, 654, 655
Bridgeport Guardians v. Bridgeport Civil Serv. Comm'n, 482 F. 2d 1333 244
Brown v. GSA, 425 U. S. 820 153
Brown v. United States, 356 U. S. 148 617, 629
Bruns, Nordeman & Co. v. American Nat. Bank, 394 F. 2d 300 152, 163
Buck v. Kuykendall, 267 U. S. 307 827
Buckeye Power, Inc. v. EPA, 481 F. 2d 162 172
Buckley v. Valeo, 424 U. S. 1 100, 330, 842
Buffum v. Chase Nat. Bank, 192 F. 2d 58 151
Buford v. Henderson, 524 F. 2d 147 327
Bulova Watch Co. v. United States, 365 U. S. 753 153
Burns v. Ohio, 360 U. S. 252 331, 333
Cafeteria Workers v. McElroy, 367 U. S. 886 118, 120, 351, 494
Calero-Toledo v. Pearson Yacht Leasing, 416 U. S. 663 575, 581, 594, 600, 601, 606
California v. Stastny, 382 F. Supp. 222 178
California v. Taylor, 353 U. S. 553 854, 873
California v. United States, 320 U. S. 577 873
California Bankers Assn. v. Shultz, 416 U. S. 21 837
California ex rel. Water Control Bd. v. EPA, 511 F. 2d 963 179, 211
California Oregon Power v. Beaver Cement, 295 U. S. 142 139, 143
California Pub. Util. Comm'n v. United States, 355 U. S. 534 180

Page
Cameron v. United States, 252 U. S. 450 142
Camfield v. United States, 167 U. S. 518 538–540, 543, 546
Cammarano v. United States, 358 U. S. 498 264
Cantor v. Detroit Edison Co., 428 U. S. 579 869
Cantwell v. Connecticut, 310 U. S. 296 743
Carpenter v. Shaw, 280 U. S. 363 392
Carpenters v. United States, 330 U. S. 395 238
Carter v. Carter Coal Co., 298 U. S. 238 868
Carter v. Jury Comm'n, 396 U. S. 320 239
Case v. Bowles, 327 U. S. 92 854, 863, 864, 871
Case Co. v. Borak, 377 U. S. 426 444, 448
Cass v. United States, 417 U. S. 72 10
Cassell v. Texas, 339 U. S. 282 240
Castro v. Beecher, 459 F. 2d 725 244, 269
Castro v. Beecher, 334 F. Supp. 930 269
Chance v. Board of Examiners, 458 F. 2d 1167 244, 269
Chandler v. Roudebush, 425 U. S. 840 263, 917
Charlotte Nat. Bank v. Morgan, 132 U. S. 141 151, 156, 161, 162
Chemehuevi Tribe v. FPC, 420 U. S. 395 264
Chicago Mercantile Exchange v. Deaktor, 414 U. S. 113 308
Choate v. Trapp, 224 U. S. 665 392
Chris-Craft Industries v. Piper Aircraft, 480 F. 2d 341 445
City. See name of city.
Clark v. Paul Gray, Inc., 306 U. S. 583 541
Collector v. Day, 11 Wall. 113 867
Page
Collins v. Yosemite Park Co., 304 U. S. 518 542
Colon-Rosich v. Puerto Rico, 256 F. 2d 393 601
Colorado v. Toll, 268 U. S. 228 544
Colorado Interstate Co. v. FPC, 324 U. S. 581 280, 282
Colorado River Conserv. Dist. v. United States, 424 U. S. 800 138, 140, 145, 146
Committee for Public Education v. Nyquist, 413 U. S. 756 747, 752, 754, 765, 766, 768
Conley v. Gibson, 355 U. S. 41 55, 340
Coppedge v. United States, 369 U. S. 438 338, 339
Coyle v. Oklahoma, 221 U. S. 559 845, 851
Crane v. New York, 239 U. S. 195 604
Crow v. Brown, 332 F. Supp. 382 245
Crow Dog, Ex parte, 109 U. S. 556 153
Dale System, Inc. v. Time, Inc., 116 F. Supp. 527 432
Dandridge v. Williams, 397 U. S. 471 84, 289, 481, 814
Danna v. Air France, 463 F. 2d 407 304
Data Processing Serv. v. Camp, 397 U. S. 150 38, 39, 45, 58, 60
Davis v. United States, 417 U. S. 333 334
Dean Milk Co. v. Madison, 340 U. S. 349 808, 823, 827, 829, 831
De Beers Mines v. United States, 325 U. S. 212 930
Debs, In re, 158 U. S. 564 929
DeCanas v. Bica, 424 U. S. 351 605
De Lima v. Bidwell, 182 U. S. 1 599
Delta Air Lines v. CAB, 147 U. S. App. D. C. 272 305
Denney v. Duluth, 295 Minn. 22 674

209-904 O - 78 - 3

Page

DiSanto v. Pennsylvania, 273 U. S. 34 818
District of Columbia v. Carter, 409 U. S. 418 581, 582, 586, 595–597
Doe v. Bolton, 410 U. S. 179 57
Domenech v. National City Bank, 294 U. S. 199 581
Dooley v. United States, 182 U. S. 222 599
Dority v. New Mexico ex rel. Bliss, 341 U. S. 924 144
Dorr v. United States, 195 U. S. 138 540, 589
Douglas v. California, 372 U. S. 353 324
Douglas v. Hampton, 168 U. S. App. D. C. 62 244, 247, 261
Downes v. Bidwell, 182 U. S. 244 589, 599–601, 606
Draper v. Washington, 372 U. S. 487 332
Duncan v. Cammell, Laird & Co., [1942] A. C. 624 400
Dunlop v. Bachowski, 421 U. S. 560 51
Dunlop v. New Jersey, 522 F. 2d 504 850
Dunn v. Blumstein, 405 U. S. 330 286
Du Pont & Co. v. Train, 425 U. S. 933 214
Durkin v. Board of Police & Fire Comm'rs, 48 Wis. 2d 112 490
Dwyer v. City Council, 200 Cal. 505 674
Eccles v. Peoples Bank, 333 U. S. 426 546, 547
Edelman v. Jordan, 415 U. S. 651 405
E. I. du Pont & Co. v. Train, 425 U. S. 933 214
Ellis v. Maine, 448 F. 2d 1325 327
Employees v. Missouri Pub. Health Dept., 411 U. S. 279 858, 871, 873, 874, 879
Endo, Ex parte, 323 U. S. 283 113

Page

EPA v. State Water Control Bd., 426 U. S. 200 168
Epperson v. Arkansas, 393 U. S. 97 57, 746
Erie R. Co. v. Tompkins, 304 U. S. 64 727
Ernst & Ernst v. Hochfelder, 425 U. S. 185 445, 449
Estelle v. Williams, 425 U. S. 501 902
Estelle, In re, 516 F. 2d 480 930
Eubank v. Richmond, 226 U. S. 137 672, 677, 678, 683
Eubanks v. Louisiana, 356 U. S. 584 241
Euclid v. Ambler Realty Co., 272 U. S. 365 676, 677, 679
Everson v. Board of Education, 330 U. S. 1 743, 746, 747, 749, 751
Ex parte. See name of party.
Fahey, Ex parte, 332 U. S. 258 402, 403, 925
Far East Conference v. United States, 342 U. S. 570 301, 304
Fasano v. Board of County Comm'rs, 264 Ore. 574 684
Fay v. Noia, 372 U. S. 391 334
FEA v. Algonquin SNG, 426 U. S. 548 675
FPC v. Idaho Power Co., 344 U. S. 17 539
FPC v. Oregon, 349 U. S. 435 138, 144, 145
FTC v. Cement Institute, 333 U. S. 683 482, 493
FTC v. Klesner, 280 U. S. 19 301
Ferguson v. Moore-McCormack Lines, 352 U. S. 521 474, 475
Fernandez v. Wiener, 326 U. S. 340 863
Field v. Barber Asphalt Co., 194 U. S. 618 822
First Nat. Bank v. Dickinson, 396 U. S. 122 310
First Nat. Bank v. Union Trust, 244 U. S. 416 161

Page
Fitzpatrick v. Bitzer, 427 U. S. 445 870
Fitzpatrick v. United States, 178 U. S. 304 617, 629
Flast v. Cohen, 392 U. S. 83 65
Fleming v. Tacoma, 81 Wash. 2d 292 685
Florida Avocado Growers v. Paul, 373 U. S. 132 832
Fong Yue Ting v. United States, 149 U. S. 698 81, 102, 127
Ford Co. v. Dept. of Treasury of Indiana, 323 U. S. 459 405
Fornaris v. Ridge Tool Co., 400 U. S. 41 596, 597
Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525 538, 542
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 804, 806, 821, 827
Fourco Glass Co. v. Transmirra Products, 353 U. S. 222 153, 154
Fowler v. Schwarzwalder, 351 F. Supp. 721 245
Fox Film Corp. v. Doyal, 286 U. S. 123 867
Frank, In re, 183 Neb. 722 674
Fry v. United States, 421 U. S. 542 840, 842, 843, 852, 853, 861, 862, 872, 879, 880
Fuentes v. Shevin, 407 U. S. 67 354
Galvan v. Press, 347 U. S. 522 80, 122
Garden State Dairies v. Sills, 46 N. J. 349 823
Gardner v. California, 393 U. S. 367 331
Gardner v. Toilet Goods Assn., 387 U. S. 167 52
Gautreaux v. Romney, 448 F. 2d 731 245
Geer v. Connecticut, 161 U. S. 519 545
General Time Corp. v. Talley Industries, 403 F. 2d 159 446
Georgia v. Tennessee Copper Co., 206 U. S. 230 665

Page
Gerstle v. Gamble-Skogmo, Inc., 478 F. 2d 1281 445, 446, 449
Gibbons v. Ogden, 9 Wheat. 1 840, 857, 858, 862, 875, 877
Gibson v. Berryhill, 411 U. S. 564 491
Gibson v. Chouteau, 13 Wall. 92 539
Gilbert v. Nixon, 429 F. 2d 348 446
Goldberg v. Kelly, 397 U. S. 254 354, 494, 499
Golden v. Zwickler, 394 U. S. 103 57
Gomillion v. Lightfoot, 364 U. S. 339 254
Gonzalez v. Archbishop, 280 U. S. 1 711, 712, 729, 730, 732, 735
Gordon v. New York Stock Exchange, 422 U. S. 659 154–156
Goss v. Lopez, 419 U. S. 565 351
Goudy v. Meath, 203 U. S. 146 389
Graham v. Richardson, 403 U. S. 365 84–86, 95, 100, 601–604
Granite Falls State Bank v. Schneider, 319 F. Supp. 1346 61
Graves v. New York ex rel. O'Keefe, 306 U. S. 466 867
Great A&P Tea Co. v. Cottrell, 424 U. S. 366 803, 804, 808, 818, 823
Green v. Kennedy, 309 F. Supp. 1127 63
Griffin v. California, 380 U. S. 609 628
Griffin v. Illinois, 351 U. S. 12 323, 330–333
Griffiths, In re, 413 U. S. 717 85, 95, 102, 107, 109, 111, 120, 126, 602, 603, 606
Griggs v. Duke Power Co., 401 U. S. 424 236, 238, 249, 251, 258, 259, 264, 266, 269
Grimes & Hauer, Inc. v. Pollock, 163 Ohio St. 372 413

Page

Groppi v. Wisconsin, 400 U. S. 505 488
Grunewald v. United States, 353 U. S. 391 633
Gulf States Util. Co. v. FPC, 411 U. S. 747 279
Haines v. Kerner, 404 U. S. 519 340
Halliburton Oil Well Co. v. Reily, 373 U. S. 64 810, 821
Halliday v. United States, 394 U. S. 831 652, 654
Hamling v. United States, 418 U. S. 87 915
Hammer v. Dagenhart, 247 U. S. 251 868
Hampton v. Mow Sun Wong, 426 U. S. 88 608, 609, 916, 917
Hampton & Co. v. United States, 276 U. S. 394 559
Hancock v. Train, 426 U. S. 167 202, 211, 212, 214, 215, 218
Hardin v. Kentucky Utilities Co., 390 U. S. 1 58
Harisiades v. Shaughnessy, 342 U. S. 580 80, 81, 121, 127
Harper v. Mayor of Baltimore, 359 F. Supp. 1187 244, 270
Harris v. New York, 401 U. S. 222 617, 629, 630
Harris County Comm'rs Court v. Moore, 420 U. S. 77 597, 598
Hauenstein v. Lynham, 100 U. S. 483 603
Hawaii v. Mankichi, 190 U. S. 197 599
Hawaii v. Standard Oil, 405 U. S. 251 665
Hawkins v. Town of Shaw, 437 F. 2d 1286 245
Heart of Atlanta Motel v. United States, 379 U. S. 241 840
Heffernan v. Zoning Board, 50 R. I. 26 691
Heim v. McCall, 239 U. S. 175 604, 822
Heller v. New York, 413 U. S. 483 915

Page

Helvering v. Gerhardt, 304 U. S. 405 869, 870, 878
Helvering v. Mountain Producers Corp., 303 U. S. 376 867
Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 269
Hill v. Texas, 316 U. S. 400 241
Hill v. United States, 368 U. S. 424 322
Hillsborough v. Cromwell, 326 U. S. 620 346
Hilltop Realty v. South Euclid, 110 Ohio App. 535 674
Hines v. Baker, 422 F. 2d 1002 327
Hines v. Davidowitz, 312 U. S. 52 118, 602
Holloway v. Bristol-Myers Corp., 158 U. S. App. D. C. 207 301
Homecroft v. Macbeth, 238 Ind. 57 691
Hood & Sons v. DuMond, 336 U. S. 525 805, 807, 808, 817, 818, 820, 821, 830, 832, 865
Hooven & Allison Co. v. Evatt, 324 U. S. 652 540
Hoover v. United States, 416 F. 2d 431 327
Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U. S. 738 55, 340
H. P. Hood & Sons v. DuMond, 336 U. S. 525 805, 807, 808, 817, 818, 820, 821, 830, 832, 865
Houston & Texas R. Co. v. United States, 234 U. S. 342 277
Hunt v. McNair, 413 U. S. 734 747, 751, 755, 758–764, 766
Hunt v. United States, 278 U. S. 96 537, 539, 543, 546
Hunter v. Erickson, 393 U. S. 385 241, 672, 676
Huron Cement v. Detroit, 362 U. S. 440 435, 830
Hynes v. Mayor of Oradell, 425 U. S. 610 901
Ickes v. Fox, 300 U. S. 82 144

Page

Illinois C. R. Co. v. Norfolk & W. R. Co., 385 U. S. 57 478
In re. See name of party.
Insular Police Comm'n v. Lopez, 160 F. 2d 673 590, 592
ICC v. Los Angeles, 280 U. S. 52 509, 514, 522
Investment Co. Institute v. Camp, 401 U. S. 617 45, 155
Ivanhoe Irrig. Dist. v. McCracken, 357 U. S. 275 539
Jalil v. Hampton, 148 U. S. App. D. C. 415 101
James v. Dravo Contracting, 302 U. S. 134 542
James v. Valtierra, 402 U. S. 137 241, 672, 673, 678, 679, 693
Jefferson v. Hackney, 406 U. S. 535 241, 244
Jenkins v. McKeithen, 395 U. S. 411 351
J. I. Case Co. v. Borak, 377 U. S. 426 444, 448
John R. Lewis, Inc. v. Newman, 446 F. 2d 800 446
Johns Hopkins Univ. v. Hutton, 422 F. 2d 1124 450
Johnson v. Maryland, 254 U. S. 51 178
Johnson v. United States, 318 U. S. 189 618
Johnson v. Zerbst, 304 U. S. 458 645
Johnston v. Claremont, 49 Cal. 2d 826 674
Jones v. Adams, 19 Nev. 78 140
Jones v. Superintendent, Va. State Farm, 460 F. 2d 150 338
Kansas v. Colorado, 206 U. S. 46 537, 665
Kansas v. United States, 204 U. S. 331 665
Kansas City Power v. McKay, 96 U. S. App. D. C. 273 39
Katzenbach v. McClung, 379 U. S. 111 858, 871, 876
Katzenbach v. Morgan, 384 U. S. 641 813
Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 712, 721, 730, 733

Page

Kelley v. John, 162 Neb. 319 674, 692
Kennedy v. United States, 259 F. 2d 883 654
Kennedy Park Assn. v. Lackawanna, 436 F. 2d 108 245
Kennerly v. District Ct. of Montana, 400 U. S. 423 386, 387
Kenosha v. Bruno, 412 U. S. 507 284
Kent v. Dulles, 357 U. S. 116 80
Kent v. Zoning Board of Barrington, 74 R. I. 89 691
Kentucky AFL–CIO v. Puckett, 391 S. W. 2d 360 413
Kepner v. United States, 195 U. S. 100 589
Kercheval v. United States, 274 U. S. 220 653, 655
Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110 179
Keyes v. School Dist. No. 1, 413 U. S. 189 240, 243
Kingsley Pictures v. Regents, 360 U. S. 684 488
Kinsella v. Kreuger, 351 U. S. 470 600
Kirkwood v. Arenas, 243 F. 2d 863 391
Kitchens v. Alderman, 376 F. 2d 262 322
Kleindienst v. Mandel, 408 U. S. 753 80, 81, 117, 122, 127
Kleppe v. New Mexico, 426 U. S. 833 870
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 435
Kohler v. Kohler Co., 319 F. 2d 634 446
Kohn v. American Metal, 458 F. 2d 255 446
Kossick v. United Fruit, 365 U. S. 731 435
Kovacs v. Cooper, 336 U. S. 77 849
Kramer v. Union School Dist., 395 U. S. 621 286
Kreshik v. St. Nicholas Cathedral, 363 U. S. 190 731, 733
Kropf v. Sterling Heights, 391 Mich. 139 682

Page

Labor Board. See NLRB.
Labor Union. See name of trade.
La Buy v. Howes Leather Co., 352 U. S. 249 930
Lacoste v. Dept. of Conservation, 263 U. S. 545 545
Lane v. Brown, 372 U. S. 477 325, 331
Lane County v. Oregon, 7 Wall. 71 844, 845, 867
Leary v. United States, 395 U. S. 6 841, 858
Lefkowitz v. Newsome, 420 U. S. 283 648
Lemke v. Farmers Grain Co., 258 U. S. 50 806
Lem Moon Sing v. United States, 158 U. S. 538 118
Lemon v. Kurtzman, 403 U. S. 602 244, 740, 745, 747, 748, 750–754, 763–769, 771, 772
Lemon v. Kurtzman, 411 U. S. 192 745, 767, 768, 772
Leonardi v. Chase Nat. Bank, 81 F. 2d 19 151, 163
Levitt v. Committee for Pub. Educ., 413 U. S. 472 753, 766
Lewis, Inc. v. Newman, 446 F. 2d 800 446
Lichten v. Eastern Airlines, 189 F. 2d 939 305
Light v. United States, 220 U. S. 523 536, 539
Linda R. S. v. Richard D., 410 U. S. 614 37, 41, 44, 45, 58, 59
List v. Fashion Park, Inc., 340 F. 2d 457 446
Long v. District Ct. of Iowa, 385 U. S. 192 331
Longshoremen v. Boyd, 347 U. S. 222 546
Louisiana v. McAdoo, 234 U. S. 627 36
Louisiana v. Texas, 176 U. S. 1 665
Louisville & Nashville R. Co. v. United States, 397 F. Supp. 607 476

Page

Lucas v. Colorado Gen. Assembly, 377 U. S. 713 676
Ludecke v. Watkins, 335 U. S. 160 124, 125
Lunsford v. Bryan, 297 S. W. 2d 115 431
Lynch v. Household Finance, 405 U. S. 538 284, 582–584
Mabee v. White Plains Publishing Co., 327 U. S. 178 858
MacGregor v. State Life Assur. Co., 315 U. S. 280 346, 347
Machibroda v. United States, 368 U. S. 487 653
Mahler v. Eby, 264 U. S. 32 238
Martin v. Hunter's Lessee, 1 Wheat. 304 862
Maryland v. Soper, 270 U. S. 9 929–930
Maryland v. Wirtz, 392 U. S. 183 838, 840, 842, 852–855, 860, 861, 871, 873, 879, 880
Maryland Cas. Co. v. Pacific Coal Co., 312 U. S. 270 57
Maryland & Va. Churches v. Sharpsburg Church, 396 U. S. 367 709, 712, 723, 731, 733, 734
Maryland & Va. Churches v. Sharpsburg Church, 254 Md. 162 735
Mason Co. v. Tax Comm'n of Washington, 302 U. S. 186 543
Massachusetts v. Missouri, 308 U. S. 1 663, 664
Massachusetts Life Ins. v. United States, 288 U. S. 269 264
Massiah v. United States, 377 U. S. 201 627
Mathews v. Diaz, 426 U. S. 67 126, 127, 287, 288, 917
Mathews v. Eldridge, 424 U. S. 319 75, 76, 494, 495
Mattz v. Arnett, 412 U. S. 481 393

Page

Mayberry v. Pennsylvania, 400 U. S. 455 491
Mayer v. Chicago, 404 U. S. 189 332
Mayo v. United States, 319 U. S. 441 178, 179
McCarthy v. United States, 394 U. S. 459 650–654
McClanahan v. Arizona Tax Comm'n, 411 U. S. 164 375–377, 392
McCollum v. Board of Education, 333 U. S. 203 746
McCready v. Virginia, 94 U. S. 391 604
M'Cullough v. Maryland, 4 Wheat. 316 859, 861–862, 867
McDonnell Douglas Corp. v. Green, 411 U. S. 792 267
McGinnis v. Royster, 410 U. S. 263 814
McGlotten v. Connally, 338 F. Supp. 448 64
McGrady v. Cunningham, 296 F. 2d 600 654
McKelvey v. United States, 260 U. S. 353 543
McLaughlin v. Florida, 379 U. S. 184 242
McMann v. Richardson, 397 U. S. 759 648, 655–657
Meat Cutters v. Connally, 337 F. Supp. 737 675
Meek v. Pittenger, 421 U. S. 349 753, 754, 769
Memorial Hospital v. Maricopa County, 415 U. S. 250 85, 286
Memphis Steam Laundry v. Stone, 342 U. S. 389 810
Menominee Tribe v. United States, 391 U. S. 404 386, 390
Mercantile Nat. Bank v. Langdeau, 371 U. S. 555 152, 156, 161
Mescalero Apache Tribe v. Jones, 411 U. S. 145 376, 377
Metcalf & Eddy v. Mitchell, 269 U. S. 514 844, 869, 870
Metropolitan H. D. Corp. v. Arlington Heights, 517 F. 2d 409 245, 257

Page

Metros v. U. S. District Court, 441 F. 2d 313 405
Michigan v. Tucker, 417 U. S. 433 617
Michigan Nat. Bank v. Robertson, 372 U. S. 591 151, 152, 162
Miller v. California, 413 U. S. 15 915
Mills v. Electric Auto-Lite, 396 U. S. 375 444, 446–449, 560
Minneapolis-Honeywell Co. v. Nadasdy, 247 Minn. 159 691
Minnesota Rate Cases, 230 U. S. 352 860
Miranda v. Arizona, 384 U. S. 436 611, 612, 617–624, 626–628, 630
Miranda v. United States, 255 F. 2d 9 592
Missouri v. Holland, 252 U. S. 416 545
Missouri P. R. Co. v. Norwood, 42 F. 2d 765 509
Moe v. Salish & Kootenai Tribes, 425 U. S. 463 376, 377, 386, 392
Molinaro v. New Jersey, 396 U. S. 365 902
Monroe v. Pape, 365 U. S. 167 343, 582
Monrosa, The v. Carbon Black, Inc., 359 U. S. 180 472, 474
Montana-Dakota Util. Co. v. Northwestern Pub. Serv., 341 U. S. 246 278
Mora v. Mejias, 206 F. 2d 377 601
Morley Co. v. Maryland Cas. Co., 300 U. S. 185 480
Morrissey v. Brewer, 408 U. S. 471 354, 486, 489–491, 494, 495, 499
Morton v. Mancari, 417 U. S. 535 153, 155, 158, 164, 263, 376
Motor Coach Employees v. Lockridge, 403 U. S. 274 436
Mulford v. Smith, 307 U. S. 38 868

Page

Munoz v. Porto Rico Ry. Power Co., 83 F. 2d 262 592
Murchison, In re, 349 U. S. 133 497
Myers v. United States, 272 U. S. 52 841
NAACP v. FPC, 425 U. S. 662 521
National Bank v. Associates of Obstetrics, 425 U. S. 460 151, 152, 162
National Bank v. Yankton, 101 U. S. 129 586
National Cable Television Assn. v. United States, 415 U. S. 336 559, 560
NLRB v. General Motors, 373 U. S. 734 409, 414, 416, 425, 426
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 868
National Land & Investment Co. v. Easttown Bd., 419 Pa. 504 682
National League of Cities v. Usery, 426 U. S. 833 817, 822
National Woodwork Mfrs. Assn. v. NLRB, 386 U. S. 612 564
Navajo Tribe v. Train, 169 U. S. App. D. C. 195 51
Neal v. Delaware, 103 U. S. 370 241
Nebraska v. Wyoming, 325 U. S. 589 144
New York v. New Jersey, 256 U. S. 296 665
New York v. United States, 326 U. S. 572 843, 863, 866, 867, 872, 873, 878
Ng Fung Ho v. White, 259 U. S. 276 118
Nippert v. Richmond, 327 U. S. 416 810
North American Co. v. SEC, 327 U. S. 686 859
North Carolina v. Alford, 400 U. S. 25 648, 649, 657, 658
North Carolina v. Tennessee, 235 U. S. 1 370
North Dakota v. Minnesota, 263 U. S. 365 665

Page

Northern Cheyenne Tribe v. Hollowbreast, 425 U. S. 649 392
Northern Indiana Pub. Serv. Co. v. Izaak Walton League, 423 U. S. 12 449
Northern States Power v. Minnesota, 447 F. 2d 1143 15–18
Norwalk CORE v. Norwalk Redevelopment Agcy., 395 F. 2d 920 245
Nunes v. Nelson, 467 F. 2d 1380 327
Officers for Justice v. CSC, 371 F. Supp. 1328 270
Ohio v. Thomas, 173 U. S. 276 543
Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392 603
Oklahoma v. Atchison, T. & S. F. R. Co., 220 U. S. 277 665
Oklahoma v. CSC, 330 U. S. 127 863, 880
Oklahoma ex rel. Johnson v. Cook, 304 U. S. 387 665
Oklahoma ex rel. Phillips v. Atkinson Co., 313 U. S. 508 863, 874
Oklahoma Tax Comm'n v. United States, 319 U. S. 598 392
Oljato Chapter of Navajo Tribe v. Train, 169 U. S. App. D. C. 195 51
Omaha Tribe of Indians v. Peters, 382 F. Supp. 421 378
Oregon v. Hass, 420 U. S. 714 617, 630
Oyama v. California, 332 U. S. 633 603
Pacific Car & Foundry Co. v. Pence, 403 F. 2d 949 403
Pacific Coast Dairy v. Dept. of Agriculture, 318 U. S. 285 542
Palmer v. Thompson, 403 U. S. 217 242–244
Palmore v. United States, 411 U. S. 389 587, 596
Panama R. Co. v. Johnson, 264 U. S. 375 435

Page
Panama Rfg. Co. v. Ryan, 293 U. S. 388 122
Panhandle Co. v. FPC, 324 U. S. 635 280, 281
Parden v. Terminal R. Co., 377 U. S. 184 854, 858, 870, 871, 873
Paris Adult Theatre I v. Slaton, 413 U. S. 49 914
Parr v. United States, 351 U. S. 513 403
Passenger Corp. v. Passengers Assn., 414 U. S. 453 321
Patsone v. Pennsylvania, 232 U. S. 138 604
Patton v. Mississippi, 332 U. S. 463 240
Paul v. Davis, 424 U. S. 693 348, 351, 353
Paul v. United States, 371 U. S. 245 179, 539, 542
Penn Dairies v. Pennsylvania Milk Comm'n, 318 U. S. 261 179
Pennsylvania v. O'Neill, 348 F. Supp. 1084 270
Pennsylvania v. West Virginia, 262 U. S. 553 665, 806, 809, 820
Pennsylvania R. Co. v. Puritan Coal Co., 237 U. S. 121 299
People v. Cook, 292 N. Y. 185 646
People v. Crane, 214 N. Y. 154 604
Perkins v. Lukens Steel Co., 310 U. S. 113 822
Perry v. Sindermann, 408 U. S. 593 118, 316, 344, 485, 488
Peters v. Hobby, 349 U. S. 331 113
Phillips v. Atkinson Co., 313 U. S. 508 863, 874
Pierre v. Louisiana, 306 U. S. 354 241
Pike v. Bruce Church, Inc., 397 U. S. 137 804, 805, 818, 821, 823, 827–829
Pitts v. Wisconsin Dept. of Revenue, 333 F. Supp. 662 64
Page
Poe v. Ullman, 367 U. S. 497 52, 66
Polar Ice Cream Co. v. Andrews, 375 U. S. 361 808, 823, 829
Posadas v. National City Bank, 296 U. S. 497 154
Power Reactor Co. v. Electricians, 367 U. S. 396 263
Presbyterian Church v. Hull Church, 393 U. S. 440 709, 710, 712, 731, 733, 734
Propper v. Clark, 337 U. S. 472 346
Public Affairs Press v. Rickover, 369 U. S. 111 546
Puerto Rico v. Shell Co., 302 U. S. 253 580, 581
Raffel v. United States, 271 U. S. 494 628, 632, 633
Rahrer, In re, 140 U. S. 545 860
Railway Employes' Dept. v. Hanson, 351 U. S. 225 437
Raley v. Ohio, 360 U. S. 423 619
Rassmussen v. United States, 197 U. S. 516 599
Reagan v. United States, 157 U. S. 301 629
Red Rock v. Henry, 106 U. S. 596 158
Reeside v. Walker, 11 How. 272 321
Regional Rail Reorg. Act Cases, 419 U. S. 102 154
Reid v. Covert, 351 U. S. 487 600
Reid v. Covert, 354 U. S. 1 600
Retail Clerks v. Schermerhorn, 373 U. S. 746 409, 413, 417, 427
Ricci v. Chicago Mercantile Exchange, 409 U. S. 289 308
Rice v. Sioux City Cemetery, 349 U. S. 70 474
Richland v. Crandall, 262 F. Supp. 538 445
Roberts v. LaVallee, 389 U. S. 40 331
Roche v. Evaporated Milk Assn., 319 U. S. 21 402, 403, 930

Page

Rodgers v. United States, 185 U. S. 83 153
Rogen v. Ilikon Corp., 361 F. 2d 260 446, 450
Romero v. International Terminal Co., 358 U. S. 354 435
Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F. 2d 846 446
Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F. 2d 852 152, 163
Rosado v. Wyman, 397 U. S. 397 302
Ross v. Moffitt, 417 U. S. 600 324, 326, 328, 329, 333
Russian Fleet v. United States, 282 U. S. 481 77
San Antonio School Dist. v. Rodriguez, 411 U. S. 1 324, 602, 814
Sanitary District v. United States, 266 U. S. 405 859, 875
Santa Cruz Fruit Packing Co. v. NLRB, 303 U. S. 453 860
Santa Rosa Indians v. Kings County, 532 F. 2d 655 388, 389
Scanwell Labs. v. Shaffer, 137 U. S. App. D. C. 371 66
Schechter Corp. v. United States, 295 U. S. 495 122
Schilb v. Kuebel, 404 U. S. 357 289
Schlagenhauf v. Holder, 379 U. S. 104 403
Schlesinger v. Councilman, 420 U. S. 738 75
Schneider v. Rusk, 377 U. S. 163 601
Schware v. Board of Bar Examiners, 353 U. S. 232 120
Schwegmann Bros. v. Calvert Distillers, 341 U. S. 384 564
Seattle Trust Co. v. Roberge, 278 U. S. 116 672, 677, 678, 683
SEC v. Texas Gulf Sulphur, 401 F. 2d 833 446
Security Insurance v. Haydis, 338 F. 2d 444 75
Serbian Orthodox Diocese v. Ocokoljich, 72 Ill. App. 2d 444 707, 735
Sere v. Pitot, 6 Cranch 332 540
Shafer v. Farmers Grain Co., 268 U. S. 189 806
Shapiro v. Thompson, 394 U. S. 618 86
Sibbach v. Wilson & Co., 312 U. S. 1 238
Sierra Club v. Morton, 405 U. S. 727 39–41, 58–61
Silber v. United States, 370 U. S. 717 238
Silver v. New York Stock Exchange, 373 U. S. 341 154, 155, 157, 164
Sinclair v. United States, 279 U. S. 263 540
Smallwood v. Pearl Brewing, 489 F. 2d 579 445, 450
Smith v. Bennett, 365 U. S. 708 325, 331
Smith v. East Cleveland, 363 F. Supp. 1131 270
Smith v. Livingston, 106 N. J. Super. 444 674
Smith v. O'Grady, 312 U. S. 329 645, 655
Smith v. Texas, 311 U. S. 128 241
Snyder v. Lakewood, 542 P. 2d 371 685
Sonesta Int'l Hotels v. Wellington Assoc., 483 F. 2d 247 446
South Carolina v. Katzenbach, 383 U. S. 301 287
South Carolina v. United States, 199 U. S. 437 870
South Carolina Hwy. Dept. v. Barnwell Bros., 303 U. S. 177 817, 820
Southern Alameda Org. v. Union City, 424 F. 2d 291 245, 678
Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U. S. 761 817, 818, 830
Southern Pacific Co. v. Hensen, 244 U. S. 205 436

Page
Southern Pacific Co. v. Sullivan, 325 U. S. 761 817, 818, 830
Southwestern Sugar Co. v. River Terminals Corp., 360 U. S. 411 304, 305
Sperry v. Florida ex rel. Florida Bar, 373 U. S. 379 863
Squire v. Capoeman, 351 U. S. 1 392
Stagg, Mather & Hough v. Descartes, 244 F. 2d 578 601
State. See also name of State.
State v. Morris, 42 Ohio St. 2d 307 632
State Water Control Bd. v. EPA, 511 F. 2d 963 179, 211
Stewart v. United States, 366 U. S. 1 633
Still v. Lance, 279 N. C. 254 345–347, 361, 362
Stokes v. People, 53 N. Y. 164 646
Stonite Products v. Melvin Lloyd Co., 315 U. S. 561 153
Strauder v. West Virginia, 100 U. S. 303 239
Sugarman v. Dougall, 413 U. S. 634 85, 95, 100–102, 104, 119, 120, 122, 126, 601–604, 606, 609
Super Tire Engineering v. McCorkle, 416 U. S. 115 58
Surplus Trading Co. v. Cook, 281 U. S. 647 544
Takahashi v. Fish & Game Comm'n, 334 U. S. 410 602–604
Taylor v. Hayes, 418 U. S. 488 491
Taylor v. United States, 238 F. 2d 409 327
Taylor v. United States, 390 F. 2d 278 629
Technitrol, Inc. v. McManus, 405 F. 2d 84 403
Terrace v. Thompson, 263 U. S. 197 603
Texas v. Louisiana, 410 U. S. 702 371
Page
Texas v. White, 7 Wall. 700 844, 867, 868
Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 298, 299
Thomas v. People, 67 N. Y. 218 646
Thomas Cusack Co. v. Chicago, 242 U. S. 526 672, 677
Thomson v. Pacific Railroad, 9 Wall. 579 870
Tilton v. Richardson, 403 U. S. 672 740, 747, 750–752, 758–766, 773, 774
Toilet Goods Assn. v. Gardner, 387 U. S. 158 52
Tollett v. Henderson, 411 U. S. 258 648
Tonasket v. Washington, 411 U. S. 451 383
Toomer v. Witsell, 334 U. S. 385 545, 805, 821, 827
Township. See name of township.
Trafficante v. Metropolitan Life, 409 U. S. 205 41, 54, 263
Train v. Natural Resources Def. Council, 421 U. S. 60 8, 169, 170, 181, 187
Truax v. Raich, 239 U. S. 33 101, 102, 120, 602–605
Tumey v. Ohio, 273 U. S. 510 491
Turner v. Fouche, 396 U. S. 346 241
Tyler v. Vickery, 517 F. 2d 1089 244
Udall v. Tallman, 380 U. S. 1 8, 260, 263, 450
Udell v. Haas, 21 N. Y. 2d 463 691
United States v. American R. Exp., 265 U. S. 425 479, 480
United States v. American Trucking Assns., 310 U. S. 534 10
United States v. Bass, 404 U. S. 336 858
United States v. Borden Co., 308 U. S. 188 154, 158, 159, 164

Page

United States v. Butler, 297 U. S. 1 868
United States v. California, 297 U. S. 175 854, 855, 859, 861, 864, 865, 867, 869, 871, 873
United States v. California, 332 U. S. 19 470, 539
United States v. California, 381 U. S. 139 470
United States v. Cariola, 323 F. 2d 180 654
United States v. Chicago, 385 F. Supp. 543 245, 270
United States v. Darby, 312 U. S. 100 836, 858, 862, 863, 868
United States v. District Ct., 401 U. S. 520 138, 139
United States v. Duell, 172 U. S. 576 403
United States v. Durham Lumber Co., 363 U. S. 522 346
United States v. Fairchild, 505 F. 2d 1378 620
United States v. Gerlach Live Stock Co., 339 U. S. 725 144
United States v. Gratiot, 14 Pet. 526 536, 539–541
United States v. Hale, 422 U. S. 171 616–619, 633
United States v. Herrera, 474 F. 2d 1049 327
United States v. Herron, 20 Wall. 251 179
United States v. Jackson, 390 U. S. 570 841, 858
United States v. Jacksonville Terminal Co., 451 F. 2d 418 269
United States v. Jin Fuey Moy, 241 U. S. 394 340
United States v. Knight, 14 Pet. 301 179
United States v. Louisiana, 290 U. S. 70 524, 525
United States v. Louisiana, 339 U. S. 699; 389 U. S. 155 470
United States v. Louisiana, 363 U. S. 1 466

Page

United States v. Mazurie, 419 U. S. 544 376, 388
United States v. Midwest Oil, 236 U. S. 459 540
United States v. Mine Workers, 330 U. S. 258 179, 198
United States v. Morgan, 313 U. S. 409 493
United States v. National Assn. of Securities Dealers, 422 U. S. 694 155, 164
United States v. Nixon, 418 U. S. 683 406, 629
United States v. Pennsylvania R. Co., 242 U. S. 208 522
United States v. Philadelphia Nat. Bank, 374 U. S. 321 164
United States v. Powers, 305 U. S. 527 138
United States v. Reynolds, 345 U. S. 1 399, 400, 406
United States v. Richardson, 418 U. S. 166 39, 56, 59–61
United States v. Rickert, 188 U. S. 432 392
United States v. San Francisco, 310 U. S. 16 536, 539–541
United States v. SCRAP, 412 U. S. 669 41, 45, 58, 60–62, 511, 788
United States v. Shannon, 342 U. S. 288 474, 475
United States v. Shoaf, 341 F. 2d 832 327, 328
United States v. Sprague, 282 U. S. 716 863
United States v. Staszcuk, 517 F. 2d 53 685
United States v. Swaggerty, 218 F. 2d 875 654
United States v. Tynen, 11 Wall. 88 160
United States v. United Continental Tuna, 425 U. S. 164 24, 153
United States v. Utah Constr. & Mining, 384 U. S. 394 147

Page

United States v. Western Pacific R. Co., 352 U. S. 59 303–305
United States v. Wittek, 337 U. S. 346 179
United States v. W. T. Grant Co., 345 U. S. 629 98
U. S. Bd. of Parole v. Merhige, 487 F. 2d 25 405
U. S. Dept. of Agriculture v. Moreno, 413 U. S. 528 87
U. S. ex rel. See name of real party in interest.
United States Nat. Bank v. Hill, 434 F. 2d 1019 152, 163
United States Navigation Co. v. Cunard S. S. Co., 284 U. S. 474 301
Utah Power Co. v. United States, 243 U. S. 389 540, 543
Vermilya-Brown Co. v. Connell, 335 U. S. 377 540
Vermont v. New York, 417 U. S. 270 363, 365, 368, 369
Virginia, Ex parte, 100 U. S. 339 867
Virginia v. Tennessee, 148 U. S. 503 364, 369, 370
Virginia Pharmacy Bd. v. Virginia Council, 425 U. S. 748 916
Vitarelli v. Seaton, 359 U. S. 535 119
Vulcan Society v. CSC, 490 F. 2d 387 247
Wade v. Mississippi Coop. Extension Serv., 372 F. Supp. 126 244
Walder v. United States, 347 U. S. 62 617, 628, 629
Walz v. Tax Comm'n, 397 U. S. 664 748, 749, 768, 770
Ward v. Monroeville, 409 U. S. 57 491
Warren Trading Post v. Arizona Tax Comm'n, 380 U. S. 685 386
Warth v. Seldin, 422 U. S. 490 37, 38, 40, 41, 44, 45, 55, 59, 878
Washington v. Legrant, 394 U. S. 618 86

Page

Washington ex rel. Seattle Trust Co. v. Roberge, 278 U. S. 116 672, 677, 678, 683
Watson v. Jones, 13 Wall. 679 710, 711, 713, 714, 728, 729, 732, 735
Weems v. United States, 217 U. S. 349 238
Weinberger v. Salfi, 422 U. S. 749 72–76, 84
Weinberger v. Wiesenfeld, 420 U. S. 636 73, 76, 77, 330
West v. Portage, 392 Mich. 458 691, 692
Western Add. Community Org. v. Alioto, 330 F. Supp. 536 269
West Point Grocery v. Opelika, 354 U. S. 390 810
West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624 676
Wharton v. Wise, 153 U. S. 155 370
Wheeling Steel Corp. v. Glander, 337 U. S. 562 811
Whitus v. Georgia, 385 U. S. 545 241
WHYY v. Glassboro, 393 U. S. 117 811
Wickard v. Filburn, 317 U. S. 111 857, 876
Wilko v. Swan, 346 U. S. 427 162
Will v. United States, 389 U. S. 90 402, 403, 929, 930
Williams v. Illinois, 399 U. S. 235 334
Williams v. Lee, 358 U. S. 217 376
Williams v. Rhodes, 393 U. S. 23 286
Williamson v. Lee Optical, 348 U. S. 483 289, 813
Willingham v. Morgan, 395 U. S. 402 75
Willner v. Committee on Character, 373 U. S. 96 120
Willson v. Black-Bird Creek Marsh Co., 2 Pet. 245 830
Wilson v. Cook, 327 U. S. 474 544
Wilson v. New, 243 U. S. 332 853

	Page
Winters v. United States, 207 U. S. 564	138, 139
Wisconsin v. Constantineau, 400 U. S. 433	348, 351, 598
Withrow v. Larkin, 421 U. S. 35	490, 493, 497, 499
Wollen v. Fort Lee, 27 N. J. 408	674
Wong Wing v. United States, 163 U. S. 228	77
Wong Yang Sung v. McGrath, 339 U. S. 33	77
Wright v. Council of Emporia, 407 U. S. 451	243
Wright v. Rockefeller, 376 U. S. 52	240
Yakus v. United States, 321 U. S. 414	675
Yick Wo v. Hopkins, 118 U. S. 356	241, 254, 603
Yu Cong Eng v. Trinidad, 271 U. S. 500	100
Zemel v. Rusk, 381 U. S. 1	80
Zwickler v. Koota, 389 U. S. 241	585

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1975

TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 74-1270. Argued December 9, 1975—Decided June 1, 1976

The Federal Water Pollution Control Act (FWPCA) makes it unlawful to discharge "pollutants" into navigable waters without a permit from the Administrator of the Environmental Protection Agency (EPA), and defines the term "pollutant" to include, *inter alia*, "radioactive materials." The Atomic Energy Act (AEA) regulates the production, possession, and use of three types of radioactive materials—source, byproduct, and special nuclear materials—and pursuant to its authority under the AEA the Atomic Energy Commission (AEC) (now succeeded in this capacity by the Nuclear Regulatory Commission) has issued regulations governing the discharge of such materials into the environment by AEA licensees. After the EPA Administrator had disclaimed any authority under the FWPCA to regulate the discharge of these three types of radioactive materials covered by the AEA, respondents, who claimed potential harm from the discharge of radioactive effluents from two nuclear plants in Colorado operated in conformity with AEC standards, brought suit against peti-

tioners, the EPA and its Administrator, seeking a declaration that the definition of "pollutant" under the FWPCA encompasses all radioactive materials, including those regulated under the AEA, and an injunction directing petitioners to regulate the discharge of all such materials. The District Court held that the AEC had exclusive authority to regulate discharges of radioactive materials covered by the AEA, but the Court of Appeals reversed, holding, exclusively by reference to the FWPCA's language and without reference to its legislative history, that the FWPCA requires the EPA to regulate discharges of all radioactive materials, including those covered by the AEA. *Held:*

1. To the extent that the Court of Appeals excluded reference to the FWPCA's legislative history in discerning the meaning of the statute, the court was in error, for "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544. Pp. 9–11.

2. The FWPCA's legislative history reflects a congressional intention not to alter the AEC's control over the discharge of source, byproduct, and special nuclear materials. Therefore, the "pollutants" subject to regulation under the FWPCA do not include such materials, and the EPA Administrator acted in accordance with his statutory mandate in declining to regulate the discharge of these materials. Pp. 11–25.

507 F. 2d 743, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Deputy Solicitor General Randolph argued the cause for petitioners. With him on the brief were *Solicitor General Bork, Assistant Attorney General Johnson, Harriet S. Shapiro, Raymond N. Zagone, Dirk D. Snel,* and *Robert V. Zener.*

David C. Mastbaum argued the cause for respond-

ents. With him on the brief were *Richard Cotton* and *David E. Engdahl.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether the Environmental Protection Agency (EPA) has the authority under the Federal Water Pollution Control Act (FWPCA), as amended in 1972, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* (1970 ed., Supp. IV), to regulate the discharge into the

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**Henry V. Nickel* and *Marx Leva* filed a brief for the Boston Edison Co. et al. as *amici curiae* urging reversal.

Michael S. Baram, pro se, filed a brief for Michael S. Baram et al. as *amici curiae* urging affirmance.

A brief of *amici curiae* was filed by *Evelle J. Younger,* Attorney General, *Robert H. O'Brien,* Assistant Attorney General, and *Nicholas C. Yost, C. Foster Knight,* and *Janet I. Motley,* Deputy Attorneys General, for the State of California, joined by the Attorneys General and other officials for their respective States as follows: *John P. Moore,* Attorney General of Colorado, and *David Robbins,* First Assistant Attorney General; *Robert L. Shevin,* Attorney General of Florida, and *Kenneth F. Hoffman,* Assistant Attorney General; *Curt Schneider,* Attorney General of Kansas, and *Thomas Wobker,* Assistant Attorney General; *Francis B. Burch,* Attorney General of Maryland, and *Warren K. Rich,* Assistant Attorney General; *Francis X. Bellotti,* Attorney General of Massachusetts; *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General; *Warren R. Spannaus,* Attorney General of Minnesota, *Peter W. Sipkins,* Solicitor General, and *Eldon G. Kaul,* Assistant Attorney General; *John C. Danforth,* Attorney General of Missouri, and *Robert M. Lindholm,* Assistant Attorney General; *Warren B. Rudman,* Attorney General of New Hampshire, and *Donald Stever,* Assistant Attorney General; *Louis J. Lefkowitz,* Attorney General of New York, and *John Shea III,* Assistant Attorney General; *Michael Alushin,* Attorney General of Pennsylvania; *John L. Hill,* Attorney General of Texas, and *Douglas Caroom,* Assistant Attorney General; and *Slade Gorton,* Attorney General of Washington, and *Charles B. Roe,* Senior Assistant Attorney General.

209-904 O - 78 - 4

Nation's waterways of nuclear waste materials subject to regulation by the Atomic Energy Commission (AEC) and its successors under the Atomic Energy Act of 1954 (AEA). 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.* In statutory terms, the question is whether these nuclear materials are "pollutants" within the meaning of the FWPCA.

I

Respondents are Colorado-based organizations and Colorado residents who claim potential harm from the discharge of radioactive effluents from two nuclear plants—the Fort St. Vrain Nuclear Generating Station and the Rocky Flats nuclear weapons components plant. These facilities are operated in conformity with radioactive effluent standards imposed by the AEC pursuant to the Atomic Energy Act. The dispute in this case arises because the EPA has disclaimed any authority under the FWPCA to set standards of its own to govern the discharge of radioactive materials subject to regulation under the AEA. Respondents, taking issue with the EPA's disclaimer of authority, brought this suit against petitioners, the EPA and its Administrator, under § 505 of the FWPCA, 33 U. S. C. § 1365 (1970 ed., Supp. IV), which authorizes "citizen suits" against the Administrator for failure to perform nondiscretionary duties under the FWPCA. They sought a declaration that the definition of a "pollutant" under the FWPCA encompasses all radioactive materials, including those regulated under the terms of the AEA, and an injunction directing the EPA and its Administrator to regulate the discharge of all such radioactive materials.

On cross-motions for summary judgment, the United States District Court for the District of Colorado held that the AEC had exclusive authority to regulate discharges of radioactive materials covered by the AEA.

373 F. Supp. 991 (1974). The Court of Appeals for the Tenth Circuit reversed, holding that the FWPCA requires the EPA to regulate discharges into the Nation's waters of all radioactive materials, including those covered by the AEA. 507 F. 2d 743 (1974). Because of the importance of the issue involved in this case, we granted certiorari. 421 U. S. 998 (1975). We now reverse.

II

Since 1946, when the first Atomic Energy Act was passed, 60 Stat. 755, the Federal Government has exercised control over the production and use of atomic energy through the AEC—replaced since the commencement of this litigation by the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA).[1] Under the AEA, private parties are permitted to engage in the production of atomic energy for industrial or commercial purposes, but only in accordance with licenses issued by the AEC (NRC) in the furtherance of the purposes of the Act. 42 U. S. C. § 2133.

The comprehensive regulatory scheme created by the AEA embraces the production, possession, and use of three types of radioactive materials—source material,[2]

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[1] Under the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U. S. C. § 5801 *et seq.* (1970 ed., Supp. IV), the licensing and related regulatory functions of the AEC were transferred to the NRC; the ERDA assumed responsibility for the operation of Government nuclear research and production facilities. 42 U. S. C. §§ 5841 (f), 5842, 5814 (c) (1970 ed., Supp. IV). We will refer generally to the AEC to cover the NRC and ERDA after their formation, except where the context requires specific designation of the NRC or ERDA.

[2] "The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material;

special nuclear material,[3] and byproduct material.[4] In carrying out its regulatory duties under the AEA, the AEC is authorized to establish "such standards . . . as [it] may deem necessary or desirable . . . to protect health or to minimize danger to life or property." 42 U. S. C. § 2201 (b). See also 42 U. S. C. §§ 2073 (b), (e), 2093 (b), 2111, 2133 (a), (d), 2134 (d). Pursuant to this authority, the AEC (NRC) has established by regulation maximum permissible releases of source, byproduct, and special nuclear materials into the environment by licensees. 10 CFR § 20.106 and App. B, Table II (1976). The regulations further provide that licensees should, in addition to complying with the established limits, "make every reasonable effort to maintain . . . releases of radioactive materials in effluents . . . as low as is reasonably achievable." 10 CFR § 20.1 (c) (1976). Similarly, the regulations require that nuclear facilities be designed to keep levels of radioactive material in effluents "as low as is reasonably achievable." 10 CFR § 50.34a (1976). See also 10 CFR §§ 50.36a, 50.57 (a) (3), (6) (1976).[5]

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or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time." 42 U. S. C. § 2014 (z).

[3] "The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U. S. C. § 2014 (aa).

[4] "The term 'byproduct material' means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." 42 U. S. C. § 2014 (e).

[5] The Fort St. Vrain Nuclear Generating Station is owned and operated by an NRC licensee, and is accordingly bound by the AEC (NRC) regulations. The Rocky Flats plant is a federal

The FWPCA established a regulatory program to control and abate water pollution, stating as its ultimate objective the elimination of all discharges of "pollutants" into the navigable waters by 1985. In furtherance of this objective, the FWPCA calls for the achievement of effluent limitations that require applications of the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. 33 U. S. C. § 1311 (b) (1970 ed., Supp. IV). These effluent limitations are enforced through a permit program. The discharge of "pollutants" into water is unlawful without a permit issued by the Administrator of the EPA or, if a State has developed a program that complies with the FWPCA, by the State.[6] 33 U. S. C. §§ 1311 (a), 1342 (1970 ed., Supp. IV).

The term "pollutant" is defined by the FWPCA to include, *inter alia*, "radioactive materials."[7] But when

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facility operated for the ERDA by a private contractor to fabricate plutonium into nuclear weapon parts. The ERDA is also responsible for the operation of approximately 24 other facilities that discharge low levels of source, byproduct, and special nuclear materials. All of these facilities are required to conform to the same effluent standards established by the NRC for commercial facilities. Executive Order No. 11752, § 4 (a) (6), 3 CFR, p. 384 (1974).

[6] The permit program of Colorado, where this case originated, was approved by the EPA on April 8, 1975. 40 Fed. Reg. 16713.

[7] "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is

the Administrator of the EPA adopted regulations governing the permit program, 40 CFR, pt. 125 (1975), he specifically excluded source, byproduct, and special nuclear materials—those covered by the AEA—from the program upon his understanding of the relevant legislative history of the FWPCA:

> "The legislative history of the Act reflects that the term 'radioactive materials' as included within the definition of 'pollutant' in section 502 of the Act covers only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term 'pollutant' are radium and accelerator produced isotopes." 40 CFR § 125.1 (y) (1975) (citations omitted).[8]

It was the Administrator's exclusion of source, byproduct, and special nuclear materials from the permit program, and consequent refusal to regulate them, that

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located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." 33 U. S. C. § 1362 (6) (1970 ed., Supp. IV).

[8] Respondents suggest that the EPA's original interpretation of the term "radioactive materials" was to the contrary. They note that the initial public notice on the Fort St. Vrain permit application—published before the EPA regulations interpreting the Act to exclude coverage of AEA-regulated radioactive materials—contemplated the imposition of limitations on the discharge of "liquid radioactive wastes." Since we do not depend upon the EPA interpretation of the Act in reaching our conclusion, it is unnecessary to consider whether any alleged inconsistencies in the EPA's position warrant our treating it with less deference than would otherwise be the case. See, *e. g.*, *Train* v. *Natural Resources Defense Council*, 421 U. S. 60, 87 (1975); *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965).

precipitated the instant lawsuit. The question we are presented with, then, is whether source, byproduct, and special nuclear materials are "pollutants" within the meaning of the FWPCA.

III

The Court of Appeals resolved the question exclusively by reference to the language of the statute. It observed that the FWPCA defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U. S. C. § 1362 (19) (1970 ed., Supp. IV). And it noted that the reference to "radioactive materials" in the definition of "pollutant" was without express qualification or exception, despite the fact that the overall definition of "pollutant" does contain two explicit exceptions.[9] The court concluded from this analysis of the language that by the reference to "radioactive materials" Congress meant *all* radioactive materials. The court explained:

> "In our view, then, the statute is plain and unambiguous and should be given its obvious meaning. Such being the case, . . . we need not here concern ourselves with the legislative history of the 1972 Amendments. In this regard we would note parenthetically that in our view the legislative history of the 1972 Amendments is conflicting and inconclusive. Be that as it may, in the case before us there is no need to address ourselves to the ofttimes difficult task of ascertaining legislative intent through legislative history. Here, the legislative intent is clearly manifested in the language of the statute itself, and we need not resort to legislative history." 507 F. 2d, at 748 (citations omitted).

To the extent that the Court of Appeals excluded

[9] See n. 7, *supra*.

reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544 (1940) (footnotes omitted). See *Cass* v. *United States*, 417 U. S. 72, 77–79 (1974). See generally Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col. L. Rev. 1299 (1975). In this case, as we shall see, the legislative history sheds considerable light on the question before the Court.

Before turning to the various legislative materials, however, we pause to consider an additional argument asserted by respondents on the basis of the language of the statute. Section 1311 (f), they note, provides as follows:

> "Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters." 33 U. S. C. § 1311 (f) (1970 ed., Supp. IV).

Respondents suggest that it would be inconsistent for Congress in one section of the FWPCA to prohibit the discharge of "radiological warfare agents" and "high-level radioactive waste," both of which are subject to AEA regulation, while at the same time exempting AEA-regulated materials from the FWPCA's permit program. We see no inconsistency. That Congress has chosen to ban completely the discharge of certain high-level radioactive material regulated under the AEA does not, by itself, indicate whether Congress wanted the discharge of other radioactive material regulated under the AEA to be

subject to the FWPCA's permit program. Respondents argue further, however, that Congress' use of the phrase "[n]otwithstanding any other provisions of this chapter" before the ban on the discharge of high-level radioactive waste suggests that the discharge of such material would otherwise be subject to the FWPCA's permit program. This argument is not entirely without logical appeal, but we do not consider it determinative. Like the more general argument based on the definition of a "pollutant" as including "radioactive materials," this argument must be assessed against the background of the relevant legislative history.

IV

The legislative history of the FWPCA speaks with force to the question whether source, byproduct, and special nuclear materials are "pollutants" subject to the Act's permit program. The House Committee Report was quite explicit on the subject:

> "The term 'pollutant' as defined in the bill includes 'radioactive materials.' *These materials are those not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act. 'Radioactive materials' encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission.* Examples of radioactive material not covered by the Atomic Energy Act, and, therefore, included within the term 'pollutant,' are radium and accelerator produced isotopes." H. R. Rep. No. 92–911, p. 131 (1972), 1 Leg. Hist. 818 (emphasis added).[10]

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[10] Citations to "Leg. Hist." refer to a two-volume Committee print for the Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (1973).

The definition of "pollutant" in the House version of the bill, H. R. 11896, 92d Cong., 2d Sess., § 502 (6) (1972), 1 Leg. Hist. 1068, contained the same broad reference to "radioactive materials" as did the definition in the Senate bill, S. 2770, 92d Cong., 1st Sess., § 502 (f) (1971), 2 Leg. Hist. 1697, and the bill ultimately enacted as the FWPCA; for our purposes the definitions are identical. Moreover, the House version of the bill contained the provision now codified as § 1311 (f), banning the discharge of radiological warfare agents and high-level radioactive waste "[n]otwithstanding any other provisions of this Act." H. R. 11896, *supra*, § 301 (e), 1 Leg. Hist. 965. Thus, the House Committee, describing the import of the precise statutory language with which we are concerned, cautioned that the definition of "pollutant" did not include those radioactive materials subject to regulation under the AEA.

Respondents claim to find in the Senate Committee Report an indication that the statutory definition of "pollutant" embraces radioactive materials subject to AEA regulation. Section 306 of the Senate bill, which corresponds to 33 U. S. C. § 1316 (1970 ed., Supp. IV), required that the EPA Administrator establish "standards of performance" with respect to the discharge of pollutants from specified categories of sources, to be revised from time to time by the Administrator. The Senate Committee Report noted that nuclear fuels processing plants were not included, because the EPA did not then have "the technical capability to establish controls for such plants." S. Rep. No. 92–414, p. 59 (1971), 2 Leg. Hist. 1477. The Report then observed that the Committee "expects that EPA will develop the capability," and continued:

> "The Bureau of Radiological Health, which was transferred to the Environmental Protection Agency,

> should have the capacity to determine those levels of control which can be achieved for nuclear fuels processing plants. If they do not, such a capability should be developed and this particular source should be added to the list of new sources as soon as possible." *Ibid.*

Petitioners assert that this statement by the Committee has no bearing on the question before the Court. The statement, petitioners suggest, reflects no more than a recognition, shared by them, that the plants referred to were not intended to be wholly excluded from the reach of the FWPCA—a recognition that in their view means that the EPA can control the discharge from such plants of polluting materials other than source, byproduct, and special nuclear materials. In short, petitioners contend that the statement sheds no light on the question whether source, byproduct, and special nuclear materials are pollutants under the FWPCA.

We agree with the petitioners that the Senate Committee statement is addressed to the inclusion of nuclear fuels processing plants in the category of sources subject to the EPA's control, not to the inclusion of any particular materials within the definition of "pollutant." It is true that the reference to the development of control levels by the Bureau of Radiological Health [11] does permit the inference that the Committee was contemplating controls over the discharge of AEA-regulated radioactive materials. Still, we are not prepared to attribute greater significance to this inference than to the more explicit statement contained in the House Committee Report, a statement that, as we shall see, is amply

[11] The Bureau of Radiological Health was transferred to the EPA from the Department of Health, Education, and Welfare pursuant to § 2 (a) (3) (ii) (C) of Reorganization Plan No. 3 of 1970, which established the EPA. 84 Stat. 2087, 5 U. S. C. App., p. 610.

supported by the discussion on the floors of the House and the Senate.

A colloquy on the Senate floor between Senator Pastore, the Chairman of the Joint Committee on Atomic Energy, and Senator Muskie, the FWPCA's primary author, provides a strong indication that Congress did not intend the FWPCA to alter the AEC's control over the discharge of source, byproduct, and special nuclear materials. Senator Pastore, referring to the need to define what materials are "subject to control requirements" under the FWPCA, noted that the definition of "pollutant" included the words "radioactive materials." 2 Leg. Hist. 1265. The following exchange then took place:

> "MR. PASTORE. . . .
>
> "My question is this: Does this measure that has been reported by the committee in any way affect the existing law, that is, the existing Atomic Energy Act of 1954, insofar as the regulatory powers of the AEC are concerned with reference to radioactive material?
>
> "MR. MUSKIE. It does not; and it is not the intent of this act to affect the 1954 legislation.
>
> "MR. PASTORE. In other words, this bill does not change that feature of the Atomic Energy Act in any regard?
>
> "MR. MUSKIE. That is correct.
>
> "MR. PASTORE. I thank the Senator.
>
> "MR. MUSKIE. May I say in addition, that legislation dealing with the setting of effluent limitations as they involve nuclear powerplants is now pending in the courts. The Senator is aware of that litigation.
>
> "For example, a recent decision of the U. S. Court

of Appeals for the Eighth Circuit, in the case of Northern States Power and Light versus Minnesota, raises the issue. I would like to point out that the committee considered speaking specifically to that decision, but chose to remain silent so as not to prejudice the decision or any appeal from it.

"MR. PASTORE. Yes. As a matter of fact, that decision held that the Federal Government did preempt in this field under existing law. That is the opinion, and we hope this legislation does not change that opinion in any way, and does not affect existing law. That is all I am concerned with.

"MR. MUSKIE. The Senator is correct in his evaluation of the legislation on that point." *Id.*, at 1265–1266.

Respondents contend that this colloquy "merely reiterates that the FWPCA does not alter the regulatory authority of the AEC" over source, byproduct, and special nuclear materials. Brief for Respondents 40–41. The exchange, they assert, says nothing about the EPA's authority to regulate the same materials. The discussion is consistent, they claim, with their position that the AEC must defer to the EPA in the setting of effluent limitations for AEA-regulated materials—that, for example, NRC licenses must conform to permits issued under the FWPCA. We disagree.

The thrust of Senator Muskie's assurances that the FWPCA would not "in any way affect" the regulatory powers of the AEC was, we think, that the AEC was to retain full authority to regulate the materials covered by the AEA, unaltered by the exercise of regulatory authority by any agency under the FWPCA. This conclusion is reinforced by Senator Muskie's reference to the case of *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (CA8 1971). In that case, which was subse-

quently affirmed summarily by this Court, 405 U. S. 1035 (1972), the Eighth Circuit had held that the AEA created a pervasive regulatory scheme, vesting exclusive authority to regulate the discharge of radioactive effluents from nuclear power plants in the AEC, and pre-empting the States from regulating such discharges. The absence of any room for a state role under the AEA in setting limits on radioactive discharges from nuclear power plants [12] stands in sharp contrast to the scheme created by the FWPCA, which envisions the development of state permit programs, 33 U. S. C. §§ 1342 (b), (c) (1970 ed., Supp. IV), and allows the States to adopt effluent limitations more stringent than those required or established under the FWPCA. 33 U. S. C. § 1370 (1970 ed., Supp. IV). See also 33 U. S. C. §§ 1311 (b)(1)(C), 1314 (b), 1316 (c), 1341 (a)(1) (1970 ed., Supp. IV).[13] Senator

[12] The AEA, as amended in 1959, 73 Stat. 688, 42 U. S. C. § 2021, does permit the States to assume, pursuant to agreements with the AEC, a limited role in regulating source and byproduct materials, and special nuclear materials in quantities not sufficient to form a critical mass. But state regulatory programs must be compatible wth the AEC's regulatory program, § 2021 (d)(2), and States are precluded from playing any role in several significant areas of regulation—including the setting of limitations on radioactive discharges from nuclear power plants. § 2021 (c)(1); *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143, 1149 n. 6 (CA8 1971).

[13] Section 101 (b) of the FWPCA, 33 U. S. C. § 1251 (b) (1970 ed., Supp. IV), provides generally:

"It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate

Muskie's specific assurance to Senator Pastore that the FWPCA would not affect existing law as interpreted in *Northern States* can only be viewed, we think, as an indication that the exclusive regulatory scheme created by the AEA for source, byproduct, and special nuclear materials was to remain unaltered.[14]

In the course of the House's consideration of the FWPCA, an unsuccessful attempt was made to alter the AEA's scheme for regulating the discharge of the radioactive materials involved in this case. Representative Wolff proposed to amend what is now 33 U. S. C. § 1370 (1970 ed., Supp. IV), which gives States the authority to set more stringent limits on the discharge of pollutants, by adding a paragraph giving the States the authority to regulate the discharge of radioactive wastes from nuclear power plants. The debate on that amendment and its defeat by a 3-to-1 vote provide solid

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agencies and municipalities in connection with the prevention, reduction, and elimination of pollution."

[14] Respondents contend that a discussion between Senator Buckley and Senator Muskie on the Senate floor is indicative of an intent to permit the EPA to regulate the discharge of AEA-regulated radioactive materials. Senator Buckley expressed concern about § 511 (c)(2)(B) of the FWPCA, 33 U. S. C. § 1371 (c)(2)(B) (1970 ed., Supp. IV), which precludes agencies other than EPA from "impos[ing], as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter." Referring to recent action by the AEC to control thermal pollution of the Hudson River, Senator Buckley asked Senator Muskie whether § 511 (c)(2)(B) would bar AEC decisions "of this type" setting tougher limitations than those prescribed by the EPA. Senator Muskie's response was that the AEC would be required to abide by EPA effluent limitation controls "with respect to the subject matter which the Senator has raised." 1 Leg. Hist. 198. The subject matter raised was thermal pollution, and we do not interpret Senator Muskie's response as suggesting that a similar conclusion would be reached with respect to pollution by AEA-regulated radioactive materials.

support for the conclusion that the FWPCA's grant of regulatory authority to the EPA and the States did not encompass the control of AEA-regulated materials.

The Wolff amendment, according to its author, would "give the States a voice in deciding what kinds and amounts of such radioactive wastes may be discharged into their waters." 1 Leg. Hist. 544. In explaining the need for such an amendment, Representative Wolff noted that the time had come "to seriously consider standards more stringent than those promulgated by the AEC." *Id.*, at 545. Representative Frenzel, a co-sponsor of the amendment, pictured it as an attempt to alter the result in the *Northern States* case. The AEC, he explained, could not be expected to protect the health and safety of the public as effectively as the States, because "the AEC has a dual mission—that of promotion as well as safety." 1 Leg. Hist. 548.[15]

The opponents of the Wolff Amendment voiced strong opposition to the transfer of the AEC's regulatory authority to the States *or* to the EPA. Representative Stanton, a Member of the House Committee on Public Works, which reported the House bill, stated:

> "The amendment presents the House with a very complex and difficult proposition. It proposes to take authority for the setting of pollution control standards from the AEC and places it in the hands of EPA. For normal operations involving pollution, that control properly belongs under EPA. But atomic energy is a peculiar field. To date, the operation of the atomic energy program has been under the control of the Commission itself. Eventually, such control will be delegated to the States as more and more knowledgeable people at the State level be-

[15] See also 1 Leg. Hist. 552 (remarks of Rep. Hungate), 555 (remarks of Rep. McClory).

> come involved in the atomic energy program. That time, however, has not yet arrived. Until we reach that stage it is obvious that the control of which we speak should remain with the Atomic Energy Commission itself, as the committee points out on page 131 of House Report 92–911 [quoted *supra*, at 11], which accompanies this bill. For this reason, I would oppose the amendment offered by my distinguished colleague." *Id.*, at 554–555.

Representative Price, Vice Chairman of the Joint Committee on Atomic Energy, argued against the amendment as follows:

> "The bill as reported establishes a program of effluent limitations and standards, and section 510 clearly provides that the States may set more restrictive standards should they so desire. The proposed amendment is aimed at two so-called pollutants—radioactive materials and thermal discharges—and seeks to collaterally amend any statute enacted by the Congress relative to them without any specific reference to the statutes that might be affected. As to radioactive materials, the target of the amendment is obvious. It seeks to reverse the decisions of the courts which have held that the Atomic Energy Act of 1954 preempted to the Federal Government, acting through the Atomic Energy Commission, the exclusive jurisdiction to regulate most radioactive materials. Clearly, if such is the will of the House, it should be undertaken only after a thorough examination of the impact of such a decision and it should be done directly by amending the statute involved—the Atomic Energy Act—not collaterally through this legislation. If this amendment had been proposed as a piece of original legislation, it would have been referred to the appropriate

209-904 O - 78 - 5

> committee for hearings and evaluation of all the pertinent factors involved in such a decision. I could go on with the explanation of those factors, but this is not the time nor the place for such a consideration in the first instance. This bill is not the appropriate vehicle for amending a major piece of legislation, thoroughly considered in committee and by the Congress, which established at the direction of the Congress a thorough and pervasive regulatory program relative to radioactive materials." *Id.*, at 556.

Representative McCormack, a Member of the House Committee on Public Works and Chairman of the House Science and Astronautics Committee's Task Force on Energy Research and Development, urged the amendment's defeat in similar terms. After noting the inadvisability of "throwing away" the AEC's "meticulous work" in the area of safety in favor of state regulation, *id.*, at 550, he concluded:

> "[I]t is obvious from the report by the House Committee on Public Works for this bill, and from the committee report from the other body that this bill does not impact directly upon the Atomic Energy Act of 1954. This bill applies only to radioactive materials not covered by the Atomic Energy Act of 1954 and, as such, the amendment is not relevant to this bill at all." *Id.*, at 551.[16]

Respondents urge that the Wolff amendment was addressed only to the question of the States' regulatory authority, and that its defeat did not reflect any intent to foreclose regulation of source, byproduct, and special nuclear materials by the EPA. We do not agree that

[16] See also *id.*, at 546–547 (remarks of Rep. Holifield); 553 (remarks of Rep. Hosmer); 553 (remarks of Rep. Clausen); 557 (remarks of Rep. Harsha).

the House's consideration of the Wolff amendment leaves room for EPA regulation. Several of the opponents of the amendment were quite explicit in their reliance upon the House Committee Report's statement that radioactive materials subject to AEA regulation were excluded from the coverage of the FWPCA.[17] Neither Representative Wolff nor Representative Frenzel took issue with that interpretation in the course of the debate on their amendment,[18] and indeed it is arguable that their amendment was premised on the assumption that source, byproduct, and special nuclear materials were wholly beyond the scope of the FWPCA. If these materials were covered by the Act—that is, if they were "pollutants"—the amendment was wholly superfluous, for the *unamended* provision that is now 33 U. S. C. § 1370 (1970 ed., Supp. IV) would permit the States to regulate their discharge. But regardless of the underlying assumptions of the sponsors of the Wolff amend-

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[17] In addition to the comments of Representatives Stanton and McCormack, quoted above, see *id.*, at 587–588 (remarks of Reps. Holifield, Jones, Harsha, and Hosmer).

[18] The statements of Representatives Wolff and Frenzel referred to above suggest that they recognized the absence of any role for the EPA in regulating the materials in question. In explaining the need to vest regulatory power in the States, they both referred to the inadequacy of regulation by the AEC, without any mention of the prospect of regulation by the EPA.

It should not escape mention that one supporter of the Wolff amendment, Representative McClory, urged its adoption "in order to make eminently clear that we are controlling nuclear . . . pollution in this bill." *Id.*, at 555. To the extent that this statement suggested that the amendment merely clarified what the House bill already provided, it is a far less persuasive indicator of legislative intent than the contrary statements by the successful opponents of the amendment. Similarly, Representative Frenzel's statement the day after the Wolff amendment was defeated that the FWPCA applied to AEA-regulated radioactive materials, 1 Leg. Hist. 745–746, is not entitled to great weight.

ment, the interpretation respondents would place upon its defeat is unacceptable. As respondents would have it, the House expressed an intent to permit EPA regulation of the materials in question, but to preclude state regulation of the same materials under the FWPCA. That result could find no basis in the language of the Act. In our view, then, the House's consideration and rejection of the Wolff amendment offers additional support for the interpretation stated in the House Committee Report that source, byproduct, and special nuclear materials are beyond the reach of the FWPCA.

The House's rather explicit statement of intent to exclude AEA-regulated materials from the FWPCA was unchallenged by the Conference Committee, which simply retained the same reference to "radioactive materials" contained in both the House and Senate bills. S. Conf. Rep. No. 92–1236, p. 144 (1972), 1 Leg. Hist. 327. Representative Harsha, a ranking member of the Conference Committee, explained the import of the Conference Committee action as follows:

> "The conference report does not change the original intent as it was made clear in the colloquy between Senators Muskie and Pastore in the course of the debate in the other body. I also note that an amendment to H. R. 11896 was offered on March 28, 1972, which would have overturned the Northern States Power against Minnesota case.
>
> "The distinguished gentleman from California (Mr. Holifield) spoke in opposition to the amendment and pointed out the necessity of not changing the careful division of authority between the States and the Federal Government over nuclear materials and facilities as enunciated in the Northern States case. The amendment was defeated by a 3-to-1 vote of the House.

> "I can say to the gentleman from Illinois that the managers in no way detracted from the intent of the language in H. R. 11896. I also note that the Committee on Public Works in its report on H. R. 11896 stated on page 131 that the term 'pollutant' as defined in the bill includes 'radioactive materials.' These materials are not those encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that act. 'Radioactive materials' encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. Examples of radioactive materials not covered by the Atomic Energy Act, and, therefore, included within the term 'pollutant' are radium and accelerator produced isotopes. This language adequately reflects the intent of the managers of the conference report." *Id.*, at 226–227.

See also *id.*, at 229 (remarks of Rep. Jones). With no one expressing a different view of the Conference action, the House proceeded to agree to the Conference Report. *Id.*, at 276.[19]

V

If it was not clear at the outset, we think it abundantly clear after a review of the legislative materials that reliance on the "plain meaning" of the words "radioactive materials" contained in the definition of "pollutant" in the FWPCA contributes little to our understanding of

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[19] We also note that in the course of its consideration of the Energy Reorganization Act of 1974, 88 Stat. 1233, which created the NRC and ERDA, the House rejected an amendment that would have transferred from those agencies to the EPA the authority to set emission standards for source, byproduct, and special nuclear materials. 119 Cong. Rec. 42615–42616 (1973).

whether Congress intended the Act to encompass the regulation of source, byproduct, and special nuclear materials. To have included these materials under the FWPCA would have marked a significant alteration of the pervasive regulatory scheme embodied in the AEA. Far from containing the clear indication of legislative intent that we might expect before recognizing such a change in policy, cf. *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168–169 (1976), the legislative history reflects, on balance, an intention to preserve the pre-existing regulatory plan.[20]

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[20] It does not follow, however, that the EPA has no role to play in protecting the environment from excessive radiation attributable to AEA-regulated materials. The EPA was established by Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U. S. C. App., p. 609. Among the functions transferred to the EPA under the plan were:

"The functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended, . . . [that] consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material." § 2 (a) (6), 84 Stat. 2088, 5 U. S. C. App., p. 610.

In his message accompanying the reorganization plan, President Nixon emphasized that the AEC was to "retain responsibility for the implementation and enforcement of radiation standards through its licensing authority." 5 U. S. C. App., p. 612. Petitioners' brief, expressing the views of the EPA, NRC, and ERDA, explains the resultant division of authority as follows:

"EPA was to set generally applicable radiation standards, limiting the total amount of permissible radiation in the environment from major categories of sources, while the AEC was to prescribe the limitations applicable to discharges of licensed materials from particular sources which contribute to the total." Brief for Petitioners 52–53 (citations omitted).

See AEC–EPA Memoranda of Understanding, 38 Fed. Reg. 24936,

We conclude, therefore, that the "pollutants" subject to regulation under the FWPCA do not include source, byproduct, and special nuclear materials, and that the EPA Administrator has acted in accordance with his statutory mandate in declining to regulate the discharge of such materials. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

32965 (1973). See also Environmental Protection Agency, Proposed Standards for Environmental Radiation Protection for Nuclear Power Operations, 40 Fed. Reg. 23419 (1975).

SIMON, SECRETARY OF THE TREASURY, ET AL. *v.* EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74–1124. Argued December 10, 1975—Decided June 1, 1976*

Respondents in No. 74–1124 (hereinafter respondents), several low-income individuals and organizations representing such individuals, brought this class action in District Court on behalf of all persons unable to afford hospital services, against the Secretary of the Treasury and the Commissioner of Internal Revenue. They claimed that Revenue Ruling 69–545, which announced an Internal Revenue Service policy of extending favorable tax treatment under the Internal Revenue Code of 1954 (Code) to hospitals that did not serve indigents to the extent of the hospitals' financial ability, "encouraged" hospitals to deny services to indigents, and was invalid because it was an erroneous interpretation of the Code and because it had been issued in violation of the Administrative Procedure Act (APA). The complaint described instances in which the individual respondents had been refused treatment, because of their indigency, at hospitals enjoying favorable tax treatment under the policy announced in the challenged Revenue Ruling and alleged to be receiving substantial contributions as a result of that treatment. The District Court overruled the motion to dismiss of petitioners in No. 74–1124 (hereinafter petitioners), which included a challenge to respondents' standing, and, on cross-motions for summary judgment, held Revenue Ruling 69–545 void as contrary to the Code. The Court of Appeals also found standing in respondents, but upheld Revenue Ruling 69–545. *Held:* The District Court should have granted petitioners' motion to dismiss because respondents failed to establish their standing to bring this suit. Pp. 37–46.

(a) When a plaintiff's standing is challenged the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff

*Together with No. 74–1110, *Eastern Kentucky Welfare Rights Organization et al.* v. *Simon, Secretary of the Treasury, et al.*, also on certiorari to the same court.

has shown an injury to himself that is likely to be redressed by a favorable decision, and unless such a showing is made a federal court cannot exercise its power consistent with the "case or controversy" limitation of Art. III of the Constitution. Pp. 37–39.

(b) The respondent organizations, which alleged no injury to themselves *qua* organizations, cannot establish standing simply on the basis that they are dedicated to promoting access of the poor to health services. An organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. *Sierra Club* v. *Morton*, 405 U. S. 727. Pp. 39–40.

(c) Allegations that the individual respondents and members of respondent organizations were denied hospital services because of indigency do not establish a case or controversy in this suit, which is not brought against any hospital but against Treasury officials. The Art. III "case or controversy" limitation requires that a federal court act only to redress injury that fairly can be traced to the challenged action of a defendant, and not solely to some third party. Pp. 40–42.

(d) Though petitioners alleged that the adoption of Revenue Ruling 69–545 "encouraged" hospitals to deny services to indigents, it is purely speculative (1) whether the alleged denials of service are ascribable to petitioners' "encouragement" or resulted from the hospitals' decisions apart from tax considerations, and (2) whether the exercise of the District Court's remedial powers would make such services available to respondents. Respondents' allegation that the hospitals that denied them service receive substantial contributions, without more, does not establish that those hospitals are dependent upon such contributions. It thus appears that respondents relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [petitioners] acted otherwise, and might improve were the [District Court] to afford relief." *Warth* v. *Seldin*, 422 U. S. 490, 507. Consequently, respondents failed to carry their burden of showing that their injury is the consequence of petitioners' action or that prospective relief will remove the harm. *Warth* v. *Seldin*, *supra*; *Linda R. S.* v. *Richard D.*, 410 U. S. 614, followed. Pp. 42–46.

165 U. S. App. D. C. 239, 506 F. 2d 1278, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ.,

joined. STEWART, J., filed a concurring statement, *post*, p. 46. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 46. STEVENS, J., took no part in the consideration or decision of the cases.

Stuart A. Smith argued the cause for petitioners in No. 74–1124 and respondents in No. 74–1110. With him on the brief were *Solicitor General Bork, Assistant Attorney General Crampton, Ernest J. Brown, Leonard J. Henzke, Jr.*, and *Robert A. Bernstein.*

Marilyn G. Rose argued the cause for respondents in No. 74–1124 and petitioners in No. 74–1110. With her on the briefs was *Joseph N. Onek.*†

MR. JUSTICE POWELL delivered the opinion of the Court.

Several indigents and organizations composed of indigents brought this suit against the Secretary of the Treasury and the Commissioner of Internal Revenue. They asserted that the Internal Revenue Service (IRS) violated the Internal Revenue Code of 1954 (Code) and the Administrative Procedure Act (APA) by issuing a Revenue Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency-room services to indigents. We conclude that these plaintiffs lack standing to bring this suit.

I

The Code, in its original version and by subsequent amendment, accords advantageous treatment to several types of nonprofit corporations, including exemption of

†Briefs of *amici curiae* urging reversal were filed by *Stanton J. Price* for the American Public Health Assn., and by *Stanley Christopher* and *Russell D. Jacobson* for Jackson County, Mo.

Robert S. Bromberg filed a brief for the American Hospital Assn. as *amicus curiae* urging affirmance.

their income from taxation and deductibility by benefactors of the amounts of their donations. Nonprofit hospitals have never received these benefits as a favored general category, but an individual nonprofit hospital has been able to claim them if it could qualify as a corporation "organized and operated exclusively for . . . charitable . . . purposes" within the meaning of § 501 (c)(3) of the Code, 26 U. S. C. § 501 (c)(3).[1] As the Code does not define the term "charitable," the status of each nonprofit hospital is determined on a case-by-case basis by the IRS.

In recognition of the need of nonprofit hospitals for some guidelines on qualification as "charitable" corporations, the IRS in 1956 issued Revenue Ruling 56–185.[2] This Ruling established the position of the IRS to be "that the term 'charitable' in its legal sense and as it is used in section 501 (c)(3) of the Code contemplates an implied public trust constituted for some public benefit . . . ." In addition, the Ruling set out four "general requirements" that a hospital had to meet, "among other

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[1] Section 501 is the linchpin of the statutory benefit system. Subsection (a) states that organizations described in subsection (c) "shall be exempt from taxation under this subtitle . . . ." Among the organizations described in current subsection (c)(3) are nonprofit corporations "organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals." (Emphasis added.) Deduction by either an individual or a corporate taxpayer of a contribution to a nonprofit charitable corporation is allowed by §§ 170 (a), (c)(2). 26 U. S. C. §§ 170 (a), (c)(2). Other indirect benefits to such a corporation, similar in nature to the benefit it derives from third-party deductibility of contributions, are provided by various other sections the Code. See 26 U. S. C. §§ 642 (c), 2055 (a)(2), 2106 (a)(2)(A)(ii), 2522 (a)(2) and (b)(2).

[2] 1956–1 Cum. Bull. 202.

things," to be considered a charitable organization by the IRS. Only one of those requirements is important here, and it reads as follows:

> "It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered."

Revenue Ruling 56–185 remained the announced policy with respect to a nonprofit hospital's "charitable" status for 13 years, until the IRS issued Revenue Ruling 69–545 on November 3, 1969.[3] This new Ruling described two unidentified hospitals, referred to simply as Hospital A and Hospital B, which differed significantly in both

[3] 1969–2 Cum. Bull. 117. The substance of this Ruling had been issued as a policy pronouncement approximately one month earlier. Technical Info. Rel. 1022 (Oct. 8, 1969).

corporate structure and operating policies.[4] The description of Hospital A included the following paragraph:

> "The hospital operates a full time emergency room and no one requiring emergency care is denied treatment. The hospital otherwise ordinarily limits admissions to those who can pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs such as Medicare. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does serve indigent patients."

Despite Hospital A's apparent failure to operate "to the extent of its financial ability for those not able to pay for the services rendered," as required by Revenue Ruling 56–185, the IRS in this new Ruling held Hospital A exempt as a charitable corporation under § 501 (c)(3).[5] Noting that Revenue Ruling 56–185 had set out require-

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[4] The descriptions fit, in whole or in part, actual hospitals as to whose tax status either a taxpayer or an IRS field office had requested advice. The anonymous reference to the hospitals in Revenue Ruling 69–545 conformed to the IRS practice of deleting "identifying details and confidential information" contained in such requests, which are dealt with privately before the underlying fact situation is used in a published Revenue Ruling. See 1969–2 Cum. Bull. xxii.

[5] In reaching this conclusion the IRS cited the law of trusts for the premise that promotion of health was a "charitable" purpose provided only that the class of direct beneficiaries was sufficiently large that its receipt of health services could be said to benefit the community as a whole. See Restatement (Second) of Trusts §§ 368, 372 (1959); 4 A. Scott, Law of Trusts §§ 368, 372 (3d ed. 1967). The IRS then applied that premise to Hospital A and concluded that by maintaining an open emergency room and providing hospital care to all persons able to pay, either directly or through insurance, the hospital served a large enough class to qualify as charitable.

ments for serving indigents "more restrictive" than those applied to Hospital A, the IRS stated that "Revenue Ruling 56–185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost."

II

Issuance of Revenue Ruling 69–545 led to the filing of this suit in July 1971 in the United States District Court for the District of Columbia, by a group of organizations and individuals. The plaintiff organizations described themselves as an unincorporated association [6] and several nonprofit corporations [7] each of which included low-income persons among its members and represented the interests of all such persons in obtaining hospital care and services. The 12 individual plaintiffs [8] described themselves as subsisting below the poverty income levels established by the Federal Government and suffering from medical conditions requiring hospital services. The organizations sued on behalf of their members, and each individual sued on his own behalf and as representative of all other persons similarly situated.

Each of the individuals described an occasion on which he or a member of his family had been disadvantaged in seeking needed hospital services because of indigency. Most involved the refusal of a hospital to admit the person because of his inability to pay a deposit or an advance fee, even though in some instances the

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[6] California Welfare Rights Organization.

[7] Eastern Kentucky Welfare Rights Organization; National Tenants Organization; Association of Disabled Miners and Widows, Inc; Health, Education, Advisory Team, Inc.

[8] One of the 12, a minor, sued by and through his parents, who also were named plaintiffs.

person was enrolled in the Medicare program. At least one plaintiff was denied emergency-room treatment because of his inability to pay immediately. And another was treated in the emergency room but then billed and threatened with suit although his indigency had been known at the time of treatment.

According to the complaint, each of the hospitals involved in these incidents had been determined by the Secretary and the Commissioner to be a tax-exempt charitable corporation, and each received substantial private contributions. The Secretary and the Commissioner were the only defendants. The complaint alleged that by extending tax benefits to such hospitals despite their refusals fully to serve the indigent, the defendants were "encouraging" the hospitals to deny services to the individual plaintiffs and to the members and clients of the plaintiff organizations. Those persons were alleged to be suffering "injury in their opportunity and ability to receive hospital services in nonprofit hospitals which receive . . . benefits . . . as 'charitable' organizations" under the Code. They also were alleged to be among the intended beneficiaries of the Code sections that grant favorable tax treatment to "charitable" organizations.

Plaintiffs made two principal claims. The first was that in issuing Revenue Ruling 69–545 the defendants had violated the Code, and that in granting charitable-corporation treatment to nonprofit hospitals that refused fully to serve indigents the defendants continued the violation. Their theory was that the legislative history of the Code, regulations of the IRS, and judicial precedent had established the term "charitable" in the Code to mean "relief of the poor," and that the challenged Ruling and current practice of the IRS departed from that interpretation. Plaintiffs' second claim was that the issuance of Revenue Ruling 69–545 without a

public hearing and an opportunity for submission of views had violated the rulemaking procedures of the APA, 5 U. S. C. § 553. The theory of this claim was that the Ruling should be considered a "substantive" rule as opposed to the "interpretative" type of rule that is exempted from the requirements of § 553.[9] Plaintiffs sought various forms of declaratory and injunctive relief.[10]

By a motion to dismiss, defendants challenged plaintiffs' standing, suggested the nonjusticiability of the subject matter of the suit, and asserted that in any event the action was barred by the Anti-Injunction Act,[11] the tax limitation in the Declaratory Judgment Act,[12] and the

[9] Section 553 (b) states that "[e]xcept when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules . . . ."

Plaintiffs also claimed that issuance of Revenue Ruling 69–545 amounted to an abuse of discretion and denied them due process of law. These claims were treated summarily or not at all by the courts below, and plaintiffs have not pressed them in this Court.

[10] Plaintiffs requested judicial declarations that defendants had violated the Code and the APA, and that a hospital's charitable status required provision of full services to persons unable to pay and those on Medicaid. In addition, they sought to enjoin defendants to suspend charitable-organization treatment of, and to refrain from extending such treatment to, any hospital that failed to submit proof, on forms to be approved by the District Court, that it served indigents and those on Medicaid without either requiring advance deposits or attempting to collect, once service had been rendered. Plaintiffs also asked the District Court to order collection of all taxes "due and owing" because of the allegedly "illegal" extension of charitable status to hospitals that refused to serve indigents.

[11] "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U. S. C. § 7421 (a).

[12] "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and

doctrine of sovereign immunity. The District Court denied this motion without opinion. On subsequent cross-motions for summary judgment the court considered but rejected each of defendants' arguments against its reaching the merits. The court then held that Revenue Ruling 69–545 was "improperly promulgated" and "without effect" insofar as it permitted nonprofit hospitals to qualify for tax treatment as charities without their offering "special financial consideration to persons unable to pay." 370 F. Supp. 325, 338 (1973).[13]

The Court of Appeals for the District of Columbia Circuit reversed. 165 U. S. App. D. C. 239, 506 F. 2d 1278 (1974). It agreed with the District Court's rejection of defendants' jurisdictional contentions, but held on the merits that Revenue Ruling 69–545 was founded upon a permissible definition of "charitable" and was not contrary to congressional intent in the Code. As to the plaintiffs' APA claim, which the District Court had not reached, the Court of Appeals held that Revenue Ruling 69–545 was an "interpretative" ruling and thus exempt from the APA's rulemaking requirements.

Plaintiffs sought a writ of certiorari in No. 74–1110 to review the Court of Appeals' judgment on the merits. Defendants filed a cross-petition in No. 74–1124 seeking review of that court's decision on the jurisdictional issues if plaintiffs' petition should be granted. We granted both petitions and consolidated them. 421

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other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U. S. C. § 2201 (emphasis added).

[13] The court entered a declaratory judgment to that effect and enjoined defendants from extending tax-exempt status to a nonprofit hospital, or allowing deductions for contributions to it, until the hospital had satisfied the requirements of previous Revenue Ruling 56–185 regarding service to indigents and had posted in its public areas a court-approved notice reciting those requirements.

209-904 O - 78 - 6

U. S. 975 (1975). Since we deal with defendants' contentions in No. 74–1124 first, and find it unnecessary to reach the issues raised by plaintiffs in No. 74–1110, we shall refer to defendants below as petitioners and to plaintiffs below as respondents.

III

In this Court petitioners have argued that a policy of the IRS to tax or not to tax certain individuals or organizations, whether embodied in a Revenue Ruling or otherwise developed, cannot be challenged by third parties whose own tax liabilities are not affected. Their theory is that the entire history of this country's revenue system, including but not limited to the evolution of the Code, manifests a consistent congressional intent to vest exclusive authority for the administration of the tax laws in the Secretary and his duly authorized delegates, subject to oversight by the appropriate committees of Congress itself. It is argued that allowing third-party suits questioning the tax treatment accorded other taxpayers would transfer determination of general revenue policy away from those to whom Congress has entrusted it and vest it in the federal courts.[14]

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[14] Petitioners rely in part upon this Court's decision in *Louisiana* v. *McAdoo*, 234 U. S. 627 (1914), as precedent for their position. In that case the State of Louisiana, as a producer of sugar, brought suit challenging the tariff rates applied by the Secretary of the Treasury to sugar imported from Cuba. This Court ordered the suit dismissed. Petitioners rely particularly upon statements in the opinion that maintenance of such actions "would operate to disturb the whole revenue system of the Government," and that "[i]nterference [by the courts] in such a case would be to interfere with the ordinary functions of government." *Id.*, at 632, 633. In view of our disposition, we express no opinion on the application of *McAdoo* to this kind of case.

In addition, petitioners analogize the discretion vested in the IRS with respect to administration of the tax laws to the discretion of a public prosecutor as to when and whom to prosecute. They thus invoke the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution. See *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973). Petitioners also renew their jurisdictional contentions that this action is barred by the Anti-Injunction Act, the Declaratory Judgment Act, and the doctrine of sovereign immunity.

We do not reach either the question of whether a third party ever may challenge IRS treatment of another, or the question of whether there is a statutory or an immunity bar to this suit. We conclude that the District Court should have granted petitioners' motion to dismiss on the ground that respondents' complaint failed to establish their standing to sue.[15]

IV

No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from deciding

[15] As noted, *supra*, at 34–35, the District Court considered petitioners' jurisdictional arguments, including their challenge to respondents' standing, when it ruled on cross-motions for summary judgment. The affidavits submitted by respondents merely supported the allegations of the complaint relative to establishing standing, rather than going beyond them. Thus, the standing analysis is no different, as a result of the case having proceeded to summary judgment, than it would have been at the pleading stage. Cf. *Warth* v. *Seldin*, 422 U. S. 490, 501–502 (1975).

political questions, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.*, at 99. As we reiterated last Term, the standing question in its Art. III aspect "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975) (emphasis in original). In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.[16]

Respondents brought this action under § 10 of the APA, 5 U. S. C. § 702, which gives a right to judicial review to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." [17] In *Data Processing Service* v. *Camp*, 397 U. S. 150 (1969), this Court held the constitutional standing requirement under this section to be allegations which, if true, would establish that the plaintiff had been injured in fact by

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[16] This Court often has noted that the focus upon the plaintiff's stake in the outcome of the issue he seeks to have adjudicated serves a separate and equally important function bearing upon the nature of the judicial process. As stated in *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), a significant personal stake serves "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."

[17] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U. S. C. § 702.

the action he sought to have reviewed. Reduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under this statute.[18] But, as this Court emphasized in *Sierra Club* v. *Morton*, 405 U. S. 727, 738 (1972), "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." See also *United States* v. *Richardson*, 418 U. S. 166, 194 (1974) (POWELL, J., concurring). The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies.[19] It is according to this settled principle that the allegations of both the individual respondents and the respondent organizations must be tested for sufficiency.

A

We note at the outset that the five respondent organizations, which described themselves as dedicated to

[18] The previous view can be found in *Kansas City Power & Light Co.* v. *McKay*, 96 U. S. App. D. C. 273, 281, 225 F. 2d 924, 932 (1955). See *Sierra Club* v. *Morton*, 405 U. S. 727, 733 (1972).

[19] The *Data Processing* decision established a second, nonconstitutional standing requirement that the interest of the plaintiff, regardless of its nature in the absolute, at least be "arguably within the zone of interests to be protected or regulated" by the statutory framework within which his claim arises. See 397 U. S., at 153. As noted earlier, respondents in this case claim that they, and of course their particular interests involved in this suit, are the intended beneficiaries of the charitable organization provisions of the Code. In view of our disposition of this case, we need not consider this "zone of interests" test.

promoting access of the poor to health services, could not establish their standing simply on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. *Sierra Club* v. *Morton, supra;* see *Warth* v. *Seldin, supra.* Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail. Since they allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. *Warth* v. *Seldin, supra,* at 511. The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury,[20] or whether the respondent organizations have established actual injury to any of their indigent members.

B

The obvious interest of all respondents, to which they claim actual injury, is that of access to hospital services. In one sense, of course, they have suffered injury to that interest. The complaint alleges specific occasions on which each of the individual respondents sought but was denied hospital services solely due to his indigency,[21] and

[20] The individual respondents sought to maintain this suit as a class action on behalf of all persons similarly situated. That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth* v. *Seldin,* 422 U. S., at 502.

[21] One of the individual respondents complains, not that he was

in at least some of the cases it is clear that the needed treatment was unavailable, as a practical matter, anywhere else. The complaint also alleges that members of the respondent organizations need hospital services but live in communities in which the private hospitals do not serve indigents. We thus assume, for purpose of analysis, that some members have been denied service. But injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant. The only defendants are officials of the Department of the Treasury, and the only claims of illegal action respondents desire the courts to adjudicate are charged to those officials. "Although the law of standing has been greatly changed in [recent] years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R. S.* v. *Richard D.*, 410 U. S., at 617.[22] In other words, the "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury

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denied service, but that he was treated and then billed despite the hospital's knowledge of his indigency. This variation of the injury does not change the standing analysis.

[22] The reference in *Linda R. S.* to "a statute expressly conferring standing" was in recognition of Congress' power to create new interests the invasion of which will confer standing. See 410 U. S., at 617 n. 3; *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972). When Congress has so acted, the requirements of Art. III remain: "[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin*, *supra*, at 501. See also *United States* v. *SCRAP*, 412 U. S. 669 (1973); cf. *Sierra Club* v. *Morton*, *supra*, at 732 n. 3.

that results from the independent action of some third party not before the court.

The complaint here alleged only that petitioners, by the adoption of Revenue Ruling 69–545, had "encouraged" hospitals to deny services to indigents.[23] The implicit corollary of this allegation is that a grant of respondents' requested relief, resulting in a requirement that all hospitals serve indigents as a condition to favorable tax treatment, would "discourage" hospitals from denying their services to respondents. But it does not follow from the allegation and its corollary that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service

[23] The Court of Appeals, in sustaining Revenue Ruling 69–545 on the merits, relied in part upon its conclusion that the new IRS policy, which apparently requires a hospital to provide free *emergency* care to indigents, may result in as much or more relief to the poor than the policy of the previous Ruling. Much of respondents' argument, and that of several of the *amici*, have been directed against that conclusion. As we do not reach the merits, we need not consider this question. But we accept for purposes of the standing inquiry respondents' averment that the IRS's new policy encourages a hospital to provide fewer services to indigents than it might have under the previous policy.

We do note, however, that it is entirely speculative whether even the earlier Ruling would have assured the medical care they desire. It required a hospital to provide care for the indigent only "to the extent of its financial ability," and stated that a low charity record was not conclusive that a hospital had failed to meet that duty. See *supra*, at 30. Thus, a hospital could not maintain, consistently with Revenue Ruling 56–185, a general policy of refusing care to all patients unable to pay. But the number of such patients accepted, and whether any particular applicant would be admitted, would depend upon the financial ability of the hospital to which admittance was sought.

specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.

It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services. It is true that the individual respondents have alleged, upon information and belief, that the hospitals that denied them service receive substantial donations deductible by the donors. This allegation could support an inference that these hospitals, or some of them, are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit respondents if a court required such admission as a condition to receipt of that treatment. But this inference is speculative at best.[24] The Solicitor General states in his brief that, nationwide, private philanthropy accounts for only 4% of private hospital revenues. Respondents introduced in the District Court a statement to Congress by an official of a hospital association describing the importance to nonprofit hospitals of the favorable tax treatment they receive as charitable corporations. Such conflicting evidence supports the commonsense proposition that the dependence upon special tax benefits may vary from hospital to hospital. Thus, respondents' allegation that

[24] The complaint reveals nothing at all about the dependence upon charitable contributions of any hospitals that might have denied services to members of respondent organizations. See *supra*, at 40–41.

certain hospitals receive substantial charitable contributions, without more, does not establish the further proposition that those hospitals are dependent upon such contributions.

Prior decisions of this Court establish that unadorned speculation will not suffice to invoke the federal judicial power. In *Linda R. S.* v. *Richard D.*, the mother of an illegitimate child averred that state-court interpretation of a criminal child support statute as applying only to fathers of legitimate children violated the Equal Protection Clause of the Fourteenth Amendment. She sought an injunction requiring the district attorney to enforce the statute against the father of her child. We held that the mother lacked standing, because she had "made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of [the statute]." 410 U. S., at 618. The prospect that the requested prosecution in fact would result in the payment of child support—instead of jailing the father—was "only speculative." *Ibid.* Similarly, last Term in *Warth* v. *Seldin* we held that low-income persons seeking the invalidation of a town's restrictive zoning ordinance lacked standing because they had failed to show that the alleged injury, inability to obtain adequate housing within their means, was fairly attributable to the challenged ordinance instead of to other factors. In language directly applicable to this litigation, we there noted that plaintiffs relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [defendants] acted otherwise, and might improve were the court to afford relief." 422 U. S., at 507.

The principle of *Linda R. S.* and *Warth* controls this case. As stated in *Warth*, that principle is that indirectness of injury, while not necessarily fatal to standing,

"may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." 422 U. S., at 505. Respondents have failed to carry this burden. Speculative inferences are necessary to connect their injury to the challenged actions of petitioners.[25] Moreover, the complaint suggests no substantial likelihood that victory in this suit would result

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[25] The courts below erroneously believed that *United States* v. *SCRAP* supported respondents' standing. In *SCRAP*, although the injury was indirect and "the Court was asked to follow [an] attenuated line of causation," 412 U. S., at 688, the complaint nevertheless "alleged a specific and perceptible harm" flowing from the agency action. *Id.*, at 689. Such a complaint withstood a motion to dismiss, although it might not have survived challenge on a motion for summary judgment. *Id.*, at 689, and n. 15. But in this case the complaint is insufficient even to survive a motion to dismiss, for it fails to allege an injury that fairly can be traced to petitioners' challenged action. See *supra*, at 40–43. Nor did the affidavits before the District Court at the summary judgment stage supply the missing link.

Our decision is also consistent with *Data Processing Service* v. *Camp*, 397 U. S. 150 (1969). The Court there stated: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.*, at 152. The complaint in *Data Processing* alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action. Accord, *Arnold Tours, Inc.* v. *Camp*, 400 U. S. 45 (1970); *Investment Co. Institute* v. *Camp*, 401 U. S. 617, 620–621 (1971). Similarly, the complaint in *Data Processing's* companion case of *Barlow* v. *Collins*, 397 U. S. 159 (1970), was sufficient because it alleged extortionate demands by plaintiffs' landlord made possible only by the challenged action of the defendant federal official. See *id.*, at 162–163. In the instant case respondents' injuries might have occurred even in the absence of the IRS Ruling that they challenge; whether the injuries fairly can be traced to that Ruling depends upon unalleged and unknown facts about the relevant hospitals.

in respondents' receiving the hospital treatment they desire. A federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits.

Accordingly, the judgment of the Court of Appeals is vacated, and the cause is remanded to the District Court with instructions to dismiss the complaint.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE STEWART, concurring.

I join the opinion of the Court holding that the plaintiffs in this case did not have standing to sue. I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I agree that in this litigation as it is presently postured, respondents (herein used to refer to plaintiffs below) have not met their burden of establishing a concrete and reviewable controversy betwen themselves and the Government with respect to the disputed Revenue Ruling. That is, however, the full extent of my agreement with the Court in this case. I must dissent from the Court's reasoning on the standing issue, reasoning that is unjustifiable under any proper theory of standing and clearly contrary to the relevant precedents. The Court's further obfuscation of the law of standing is particularly unnecessary when there are obvious and reasonable alternative grounds upon which to decide this litigation.

I

Respondents brought this action for declaratory and injunctive relief, seeking, *inter alia,* a declaration that Revenue Ruling 69–545 is inconsistent with the relevant provisions of the Internal Revenue Code and promulgated in violation of the rulemaking provisions of the Administrative Procedure Act, 5 U. S. C. § 553. Respondents claimed to be indigents, to be in need of free or below-cost medical care provided by private, nonprofit hospitals accorded tax-exempt status under the Internal Revenue Code, and to be protected by and beneficiaries of the provisions of the Code providing for tax-exempt status for nonprofit organizations engaging in "charitable" activities. Respondents alleged that they had in specified instances been denied provision of free or below-cost medical services by nonprofit hospitals accorded tax-exempt status under the Code, and that by issuing the disputed Revenue Ruling the Internal Revenue Service was "encouraging" tax-exempt hospitals to deny them such services. Accordingly, respondents alleged, the IRS was injuring them in their "opportunity and ability" to receive medical services and doing so illegally, in derogation of the results intended by the "charitable" provisions of the Code.

However, as noted by the Court, the disputed Ruling on its face applies only to a narrow category of nonprofit hospitals—those fairly characterized by the factual and legal circumstances described in the Ruling as pertaining to "Hospital A." The Ruling does not indicate what treatment will be accorded hospitals not within the situation described in the hypothesis.[1] The most hotly

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[1] Revenue Ruling 69–545, 1969–2 Cum. Bull. 117, provides in pertinent part:

"Advice has been requested whether the two nonprofit hospitals described below qualify for exemption from Federal income tax

contested portion of the disputed ruling, that modifying the earlier Revenue Ruling 56–185 by "remov[ing] therefrom the requirements relating to caring for pa-

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under section 501 (c)(3) of the Internal Revenue Code of 1954 . . . .

"*Situation 1.* Hospital *A* is a 250-bed community hospital. Its board of trustees is composed of prominent citizens in the community. Medical staff privileges in the hospital are available to all qualified physicians in the area, consistent with the size and nature of its facilities. The hospital has 150 doctors on its active staff and 200 doctors on its courtesy staff. It also owns a medical office building on its premises with space for 60 doctors. Any member of its active medical staff has the privilege of leasing available office space. Rents are set at rates comparable to those of other commercial buildings in the area.

"The hospital operates a full time emergency room and no one requiring emergency care is denied treatment. The hospital otherwise ordinarily limits admissions to those who can pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs such as Medicare. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does serve indigent patients.

"The hospital usually ends each year with an excess of operating receipts over operating disbursements from its hospital operations. Excess funds are generally applied to expansion and replacement of existing facilities and equipment, amortization of indebtedness, improvement in patient care, and medical training, education, and research.

. . . . . .

"To qualify for exemption from Federal income tax under section 501 (c)(3) of the Code, a nonprofit hospital must be organized and operated exclusively in furtherance of some purpose considered 'charitable' in the generally accepted legal sense of that term, and the hospital may not be operated, directly or indirectly, for the benefit of private interests.

"In the general law of charity, the promotion of health is considered to be a charitable purpose. *Restatement* (*Second*), *Trusts*, sec. 368 and sec. 372; IV *Scott on Trusts* (3rd ed. 1967), sec. 368 and sec. 372. A nonprofit organization whose purpose and activity are providing hospital care is promoting health and may, therefore, qualify as organized and operated in furtherance of a charitable

tients without charge or at rates below cost," is at best ambiguous regarding its application or effect respecting nonprofit hospitals not within the factual and legal situa-

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purpose. If it meets the other requirements of section 501 (c)(3) of the Code, it will qualify for exemption from Federal income tax under section 501 (a).

"Since the purpose and activity of Hospital *A*, apart from its related educational and research activities and purposes, are providing hospital care on a nonprofit basis for members of its community, it is organized and operated in furtherance of a purpose considered 'charitable' in the generally accepted legal sense of that term. The promotion of health, like the relief of poverty and the advancement of education and religion, is one of the purposes in the general law of charity that is deemed beneficial to the community as a whole even though the class of beneficiaries eligible to receive a direct benefit from its activities does not include all members of the community, such as indigent members of the community, provided that the class is not so small that its relief is not of benefit to the community. *Restatement* (*Second*), *Trusts*, sec. 368, comment (b) and sec. 372, comments (b) and (c); IV *Scott on Trusts* (3rd ed. 1967), sec. 368 and sec. 372.2. By operating an emergency room open to all persons and by providing hospital care for all those persons in the community able to pay the cost thereof either directly or through third party reimbursement, Hospital *A* is promoting the health of a class of persons that is broad enough to benefit the community.

"The fact that Hospital *A* operates at an annual surplus of receipts over disbursements does not preclude its exemptions. By using its surplus funds to improve the quality of patient care, expand its facilities, and advance its medical training, education, and research programs, the hospital is operating in furtherance of its exempt purposes.

. . . . .

"Accordingly, it is held that Hospital *A* is exempt from Federal income tax under section 501 (c)(3) of the Code.

. . . . .

"Even though an organization considers itself within the scope of *Situation* 1 of this Revenue Ruling, it must file an application on Form 1023, Exemption Application, in order to be recognized by the Service as exempt under section 501 (c)(3) of the Code.

"Revenue Ruling 56-185, C.B. 1956-1, 202 sets forth requirements

tion of Hospital A. Accordingly, there is simply no ripe controversy with respect to a claim that the disputed ruling illegally "encourages" *all* nonprofit hospitals to withdraw the provision of indigent services by removing from *all* hospitals the requirement of such services as a prerequisite to tax-exempt status.

This was the position of the Secretary of the Treasury and the Commissioner of Internal Revenue with respect to the disputed Ruling at oral argument,[2] and no repre-

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for exemption of hospitals under section 501 (c)(3) more restrictive than those contained in this Revenue Ruling with respect to caring for patients without charge or at rates below cost. . . .

"Revenue Ruling 56–185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost."

[2] *E. g.*, "Now, this ruling itself demonstrates the hypothetical quality of what the plaintiffs are seeking, the hypothetical quality of the relief they are seeking, because as the Court can readily see in [perusing] this Revenue Ruling, it sets forth two polar situations, situation 1 and situation 2, dealing with two hospitals, Hospital A and Hospital B. In Hospital A, there are a variety of facts in connection with Hospital A, it has an open board of trustees, it gives open staff privileges, it is involved in research and educational activities, it maintains a full-time emergency room, and no one requiring emergency care is denied treatment. To the contrary, [H]ospital B is almost proprietary in nature, it's owned by a small group of doctors, they limit the staff privileges to people they know, and they comprise the medical committee generally to keep out qualified physicians, et cetera, et cetera, and it maintains an emergency room, but basically to treat the patients of its own doctors.

"Now, these two polar examples were designed to educate the public generally and hospital administrators as to clear-cut situations. Hospital A is a situation, if you are like Hospital A, you will be fairly certain of exemption, but, of course, the ruling does conclude that you can't be certain of that itself. You have got to yourself submit an application for exemption to the Internal Revenue Service.

"If you are like [H]ospital B, which is a polar example of a hospital that doesn't seem to provide any community benefit, it seems to be

sentation to the contrary appears in the record. Moreover, no facts were alleged or introduced in the District Court that any way indicated with more specificity that the disputed Ruling had or was intended to have application to all nonprofit hospitals. Respondents apparently made no attempt to clarify the meaning of the Ruling in this regard, as, for example, by filing with the IRS a petition for clarification of the Ruling pursuant to the Administrative Procedure Act, 5 U. S. C. § 555 (e), see, *e. g., Dunlop* v. *Bachowski,* 421 U. S. 560, 573 (1975), or by petitioning for a revision of the Ruling pursuant to that Act, 5 U. S. C. § 553 (e), cf. *Oljato Chapter of Navajo Tribe* v. *Train,* 169 U. S. App. D. C. 195, 207, 515 F. 2d 654, 666–667 (1975), or by seeking clarification by means of discovery or an informal request. Accordingly, with respect to any claim that the Ruling illegally withdraws the requirement of the provision of indigent services from all hospitals seeking tax-exempt status under the "charitable" provisions of the Code, a "lack of ripeness inhere[s] in the fact that the need for some further procedure, some further contingency of ap-

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run pretty much strictly for the private inurement of its owner-doctors. In that situation you are not going to get a tax-exempt status.

"Now, the important thing which we emphasize is that the ruling doesn't even begin to attempt to deal with the hundreds of gradations in between Hospital A and Hospital B. Hospital A, assuming for a moment that it doesn't give free care to indigents on a broad scale, let's say it dropped its emergency room completely for, let's say, the particular example that it might be engaged in treating cancer patients or a particular kind of disease. Under those circumstances an emergency room would be superfluous because such a hospital would rarely have need for an emergency room. Or, for example, a consortium of hospitals in a particular community could get together and one could say, 'We will have the emergency room, you have the nursing school, and a third—'" Tr. of Oral Arg. 23–25.

209-904 O - 78 - 7

plication or interpretation . . . serve[s] to make remote the issue which was sought to be presented to the Court." *Poe* v. *Ullman*, 367 U. S. 497, 528 (1961) (Harlan, J., dissenting). Cf. *Toilet Goods Assn.* v. *Gardner*, 387 U. S. 158, 163–164 (1967).[3] "It is clear beyond question . . . that [the disputed Ruling] on [its] face raise[s] questions which should not be adjudicated in the abstract and in the general, but which require a 'concrete setting' for determination." *Gardner* v. *Toilet Goods Assn.*, 387 U. S. 167, 197 (1967) (opinion of Fortas, J.).

Further, if respondents wished to challenge the legality of the Ruling in respect to the unambiguous aspects of its application—its application to hospitals fairly coming within the situation described as pertaining to Hospital A—it was incumbent upon them to allege, and, at the appropriate stage of the litigation, to offer evidence to show that the hospitals whose conduct affected them were hospitals whose operations could fairly be characterized as implicated by the terms of the Ruling. Such allegations and showings were necessary to demonstrate some logical connection or nexus between the wrongful action alleged, the issuance of the disputed Ruling, and the harm of which respondents complain, injury to their "opportunity and ability" to secure medical services. This is required, of course, by the only constitutional, "case or controversy," policy affecting the law of standing—to ensure that the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the [C]ourt so largely

[3] Of course, the ripeness determination has as an integral component the question of whether the agency action is sufficiently "final" for judicial review within the meaning of the Administrative Procedure Act, 5 U. S. C. § 704. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967).

depends for illumination of difficult . . . questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

The allegations of the complaint are probably sufficient to state this claim with respect to certain of the respondents.[4] In any event, however, the petitioners (used herein to refer to defendants below) later moved for summary judgment on the standing issue, specifically arguing that "[t]he plaintiffs have failed to demonstrate that the alleged injuries complained of herein were incurred as a result of any actions on the part of the defendants." App. 154. At this point in the litigation, it was clearly incumbent upon the respondents to make a showing sufficient to create a material issue of fact whether there was any connection between the hospitals affecting them and the Ruling alleged to be illegally "encouraging" tax-exempt hospitals to withdraw the provision of indigents' services, thereby injuring respondents' "opportunity and ability" for such services.

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[4] With respect to certain of the respondents, the allegations of the complaint would seem to controvert a connection between the hospitals whose past conduct affected them and the disputed Revenue Ruling. For example, certain of the respondents alleged they were enrolled in the Medicaid program, but were denied treatment in the absence of a further cash deposit by the hospitals to which they applied for admission. This would appear to refute an inference that the hospitals involved came within the terms of the disputed Ruling and were granted tax-exempt status on that basis. No further allegations or, at summary judgment, showings were made to clarify this aspect of the case.

In fairness to respondents, it is noted that the wrongs alleged in the complaint and the relief sought went beyond simply challenging the disputed Ruling; respondents further sought to declare illegal and enjoin the IRS from granting tax-exempt status to hospitals whose operations, apart from the disputed Ruling, did not properly fall within the definition of "charitable" as required by the Internal Revenue Code. However, only issues concerning the disputed Revenue Ruling are before us on the petition for certiorari.

See *Barlow* v. *Collins*, 397 U. S. 159, 175, and n. 10 (1970) (opinion of BRENNAN, J.).[5] No such showing was made. There is absolutely no indication in the record that the contested Ruling altered the operation of these hospitals in any way, or that the tax-exempt status of these hospitals was in any way related to the Ruling. Accordingly, the petitioners were entitled to judgment in their favor on their motion for summary judgment.

II

The Court today, however, wholly ignores the foregoing aspects of this case. Rather, it assumes that the governmental action complained of *is* encouraging the hospitals affecting respondents to provide fewer medical services to indigents. *Ante*, at 42, and n. 23. This is done in order to make the gratuitous and erroneous point that respondents, as a prerequisite to pursuing any legal claims regarding the Revenue Ruling, must allege and later prove that the hospitals affecting re-

[5] Such a showing was required to demonstrate standing in respect to respondents' claim that the Revenue Ruling was promulgated in violation of the rulemaking provisions of the Administrative Procedure Act as well as for purposes of their other claims. It is true that the rulemaking section of the Act provides for notice and opportunity to comment for "interested persons," 5 U. S. C. § 553 (c). However, it is unnecessary to decide in this case whether Congress by so providing has created a cognizable interest in such participation and standing to complain of its wrongful deprivation apart from any other injury in fact flowing from the agency action. Cf. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972). Respondents in this litigation made no allegation or showing that they desired an opportunity to participate, or that they would have availed themselves of such an opportunity had it been presented. Therefore, in regard to this procedural claim no less than the other claims raised, respondents were required to demonstrate some connection between the disputed Ruling and the hospitals affecting them in order to make out some injury in fact resulting from the challenged action.

spondents "are dependent upon" their tax-exempt status, *ante*, at 44, that they would not in the absence of the Ruling's assumed "encouragement" "elect to forgo favorable tax treatment," and that the absence of the allegedly illegal inducement would "result in the availability to respondents of such services," *ante*, at 43. In reaching this conclusion, the Court abjures analysis either of the Art. III policies heretofore assumed to inhere in the constitutional dimension of the standing doctrine, or of the relevant precedents of this Court.[6]

A

First, the Court's treatment of the injury-in-fact standing requirement is simply unsupportable in the context of this case. The wrong of which respondents complain is that the disputed Ruling gives erroneous economic signals to nonprofit hospitals whose subsequent responses affect respondents; they claim the IRS is offering the economic inducement of tax-exempt status to such hospitals under terms illegal under the Internal

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[6] Moreover, by requiring that this "'line of causation,'" *ante*, at 45 n. 25, be precisely and intricately elaborated in the complaint, the Court continues its recent policy of "reverting to the form of fact pleading long abjured in the federal courts." *Warth* v. *Seldin*, 422 U. S. 490, 528 (1975) (BRENNAN, J., dissenting). One waits in vain for an explanation for this selectively imposed pleading requirement; a requirement so at odds with our usual view that under the Federal Rules of Civil Procedure "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). The want of an explanation is even more striking when considered in light of our reaffirmation of *Conley* only this Term, *Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976), and our observation therein that the same standard is applicable to testing the sufficiency of the complaint for subject-matter jurisdiction, *id.*, at 742 n. 1.

Revenue Code. Respondents' claim is not, and by its very nature could not be, that they have been and will be illegally denied the provision of indigent medical services by the hospitals. Rather, if respondents have a claim cognizable under the law, it is that the Internal Revenue Code requires the Government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit respondents. The relevant injury in light of this claim is, then, injury to this beneficial interest—as respondents alleged, injury to their "opportunity and ability" to receive medical services. Respondents sufficiently alleged this injury and if, as the Court so readily assumes, they had made a showing sufficient to create an issue of material fact that the Government was injuring this interest, they would continue to possess standing to press the claim on the merits.

Clearly such conditions if met would provide the essence of the only constitutionally mandated element of standing—a personal stake sufficient to create concrete adverseness meeting minimal conditions for Art. III justiciability. *Baker* v. *Carr*, 369 U. S., at 204; *Barlow* v. *Collins*, *supra*, at 164. See also *United States* v. *Richardson*, 418 U. S. 166, 196 n. 18 (1974) (POWELL, J., concurring). Nothing in the logic or policy of constitutionally required standing is added by the further injury-in-fact dimension required by the Court today—that respondents allege that the hospitals affecting them would not have elected to forgo the favorable tax treatment and that this would "result in the availability to respondents of" free or below-cost medical services.

Furthermore, the injury of which respondents complain is of a continuing and continuous nature, and the additional allegations and showings that the Court requires would not be determinative of the hospitals' future conduct. Even if a given hospital affecting respondents had in the past made its determination regarding indi-

gent services without regard to the tax consequences of that determination—would have elected to forgo favorable tax treatment in the absence of the allegedly illegal "encouragement"—such a choice presumably would be subject to continuous re-evaluation in the future, as the hospital's circumstances, the economic climate, and expectations regarding donor contributions changed over time. Respondents complain of and seek relief from the threat of future policy determinations by the hospitals based on the allegedly illegal tax Ruling, not redress for past "encouragement." We have often found standing in plaintiffs to complain of such future harm irrespective of any showing of the realization of such threatened injuries in the past. *E. g., Doe* v. *Bolton,* 410 U. S. 179, 188 (1973); *Epperson* v. *Arkansas,* 393 U. S. 97, 101–102 (1968).

Indeed, to the extent that there is Art. III substance to the concerns addressed by the Court today, it is not a question of *standing*—of identifying the proper party to bring the action—but rather whether the threat of the more ultimate future harm is of sufficient immediacy to meet the minimum requirements of Art. III justiciability. The task is one of distinguishing between a "justiciable controversy" and a "difference or dispute of a hypothetical or abstract character," *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240 (1937), and the question is "necessarily one of degree." *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941); *Golden* v. *Zwickler,* 394 U. S. 103, 108 (1969).

> "[I]t would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality

to warrant the issuance of a declaratory judgment." *Ibid.*

If, as the Court assumes, respondents had demonstrated that the disputed Ruling had application to the hospitals affecting them, I would have no doubt that this standard had been met. In such a case I would readily conclude:

> "[T]he challenged governmental activity . . . is not contingent, . . . and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the [responding] parties.
>
> . . . . . .
>
> "Where such state action or its imminence adversely affects the status of private parties, the courts should be available to render appropriate relief and judgments affecting the parties' rights and interests." *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115, 122, 125 (1974).

B

Second, the Court's treatment of the injury-in-fact requirement directly conflicts with past decisions. Respondents brought this action seeking general statutory review of administrative action under the provisions of the Administrative Procedure Act. Hence, the governing precedents respecting standing are those developed in *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972); and *United States* v. *SCRAP*, 412 U. S. 669 (1973). See also *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1 (1968). Any prudential, nonconstitutional considerations that underlay the Court's disposition of the injury-in-fact standing requirement in cases such as *Linda R. S.* v. *Richard D.*, 410

U. S. 614 (1973),[7] and *Warth* v. *Seldin*, 422 U. S. 490 (1975), are simply inapposite when review is sought under a congressionally enacted statute conferring standing and providing for judicial review.[8] In such a case considerations respecting "the allocation of power at the national level [and] a shift away from a democratic form of government," *United States* v. *Richardson*, 418 U. S., at 188 (POWELL, J., concurring), are largely ameliorated, and such prudential limitations as remain are supposedly

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[7] We were originally told in *Linda R. S.* v. *Richard D.*, 410 U. S., at 617, 619, that the treatment of the injury-in-fact standing requirement, and the consequent dismissal of the case owing to the lack of a "direct nexus" between the injury incurred and the wrongful action alleged, was a consequence of the "unique context of a challenge to a criminal statute," and the "special status of criminal prosecutions in our system." Although this conclusion was arguable even in its specific context, see *id.*, at 621 (WHITE, J., dissenting), last Term's *Warth* v. *Seldin*, 422 U. S. 490 (1975), taught that the raising of the threshold requirement for pleading injury in fact in *Linda R. S.* was not "unique" after all. But whatever the merits of the treatment of the injury-in-fact requirement in those cases, it is distressing that the Court should mechanically apply the approach developed therein to a case brought under the Administrative Procedure Act without any analysis, see *ante*, at 37–39, and n. 16, of the only *constitutional* dimension of standing—the requirement of concrete adverseness flowing from a personal stake in the outcome. See *United States* v. *Richardson*, 418 U. S. 166, 181 (1974) (POWELL, J., concurring).

[8] The Court has read the standing provision of the Administrative Procedure Act, 5 U. S. C. § 702, which provides for review for any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute," as conferring standing upon any person whose interest is adversely affected in fact, so long as that interest comes within the purposes and policies of the statute or statutes authorizing the agency action in question ("within the meaning of a relevant statute"). See *Sierra Club* v. *Morton*, 405 U. S., at 732–733; Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 Yale L. J. 425, 451–452, n. 105 (1974).

subsumed under the "zone of interests" test developed in *Data Processing Service* v. *Camp, supra.*[9] See *United States* v. *Richardson, supra,* at 196 n. 18 (POWELL, J., concurring).

Our previous decisions concerning standing to sue under the Administrative Procedure Act conclusively show that the injury in fact demanded is the constitutional minimum identified in *Baker* v. *Carr,* 369 U. S., at 204—the allegation of such a "personal stake in the outcome of the controversy as to assure" concrete adverseness. *Sierra Club* v. *Morton, supra,* at 732–733; *Data Processing Service* v. *Camp, supra,* at 151–152. True, the Court has required that the person seeking review allege that he personally has suffered or will suffer the injury sought to be avoided, *Sierra Club, supra,* at 740. But there can be no doubt that respondents here, by demonstrating a connection between the disputed Ruling and the hospitals affecting them, could have adequately served the policy implicated by the pleading requirement of *Sierra Club*—putting "the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Ibid.* In such a case respondents would not be attempting merely to "vindicate their own value preferences through the judicial process." *Ibid.* See Albert, *supra,* n. 8, at 485–489. If such a showing were made, a real and recognizable harm to tangible interest would have been alleged, indeed more so than we have required in other circumstances. *United States* v. *SCRAP, supra; Sierra Club* v. *Morton, supra;*

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[9] It is my view, however, that such considerations go only to other questions of justiciability or to questions of the reviewability of the administrative action, and not properly to the question of standing. *Barlow* v. *Collins,* 397 U. S., at 168–170, 171 n. 3, 173–175 (opinion of BRENNAN, J.).

cf. *Barlow* v. *Collins, supra,* at 163.[10] Moreover, the injury alleged would be a " 'distinctive or discriminating' . . . harm," *id.,* at 172 n. 5 (opinion of BRENNAN, J.), clearly a "particularized injury [setting respondents] apart from the man on the street." *United States* v. *Richardson, supra,* at 194 (POWELL, J., concurring).

Furthermore, our decisions regarding standing to sue in actions brought under the Administrative Procedure Act make plain that standing is not to be denied merely because the ultimate harm alleged is a threatened future one rather than an accomplished fact. *United States* v. *SCRAP, supra; Sierra Club* v. *Morton, supra.* Nor has the fact that the administrative action ulti-

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[10] It clearly cannot be determinative for purposes of constitutionally required standing that there is only a probabilistic connection between the immediate interest, to which injury is alleged, and some more ultimate injury to the complaining party. *United States* v. *SCRAP,* 412 U. S., at 689 n. 14, specifically rejected the argument that for standing purposes "significant" injury must be alleged. Rather, the Court held that Art. III policies were adequately fulfilled even though the ultimate injury is very small indeed. *Ibid.* Clearly there is no difference for purposes of Art. III standing—personal interest sufficient for concrete adverseness—between a small but certain injury and a harm of a larger magnitude discounted by some probability of its nonoccurrence. If the probability of the more ultimate harm is so small as to make the claim clearly frivolous, "the plaintiff can be hastened from the court by summary judgment." *Barlow* v. *Collins, supra,* at 175 n. 10 (opinion of BRENNAN, J.); *United States* v. *SCRAP, supra,* at 689, and n. 15. See, *e. g., Granite Falls State Bank* v. *Schneider,* 319 F. Supp. 1346 (WD Wash. 1970), summarily aff'd, 402 U. S. 1006 (1971). Obviously, however, if the respondents had demonstrated that the IRS was "encouraging" the hospitals affecting them to withdraw provision of medical services for indigents, the probability of the occurrence of the more ultimate injury would be sufficient to confer *standing* upon the respondents to challenge the action.

mately affects the complaining party only through responses to incentives by third parties been fatal to the standing of those who would challenge that action. *United States* v. *SCRAP, supra; Barlow* v. *Collins, supra.* And the ultimate harm to respondents threatened here is obviously much more "direct and perceptible" and the "line of causation" less "attenuated" than that found sufficient for standing in *United States* v. *SCRAP,* 412 U. S., at 688.

Certainly the Court's attempted distinction of *SCRAP* will not "wash." The Court states that in *SCRAP,* "although the injury was indirect and 'the Court was asked to follow an attenuated line of causation,' . . . the complaint nevertheless 'alleged a specific and perceptible harm' flowing from the agency action." *Ante,* at 45 n. 25. The instant case is different, the Court says, because the complaint "fails to allege an injury that fairly can be traced" to the allegedly wrongful action. I find it simply impossible fairly and meaningfully to differentiate between the allegations of the two sets of pleadings. Compare App. 13–25 in this case with App. 8–12 in No. 72–562, O. T. 1972, *Aberdeen & Rockfish R. Co.* v. *SCRAP.* The Court complains that "whether the injuries fairly can be traced to [the disputed] Ruling depends upon unalleged and unknown facts about the relevant hospitals." *Ante,* at 45 n. 25. It is obvious that the complaint in *SCRAP* lacked precisely the same specific factual allegations; there, however, the Court's response was much more in keeping with modern notions of civil procedure. 412 U. S., at 689–690, and n. 15.

Moreover, apart from the specificity required of the pleadings, it is not apparent why these "unalleged and unknown facts about the relevant hospitals" are required to establish injury in fact at all. As the Court notes, *ante,* at 42 n. 23, the earlier Revenue Ruling requires a hospital only to provide medical care "to the ex-

tent of its financial ability" and stated that a low charitable record was not conclusive on the point. Accordingly, in the absence of some showing to the contrary by the petitioners, it readily can be inferred that a hospital under the earlier Ruling would provide *some* indigent services, the maximum extent being the point at which the benefits received from the favorable tax status were exactly offset by the cost of the services conferred. If respondents had demonstrated at the summary judgment stage a connection between the disputed Ruling withdrawing this incentive and the hospitals affecting them, they would have certainly made a showing of injury to their "opportunity and ability" to receive medical care sufficient under *SCRAP* for *standing* to challenge the governmental action.

We may properly wonder where the Court, armed with its "fatally speculative pleadings" tool, will strike next. To pick only the most obvious examples, Will minority schoolchildren now have to plead and show that in the absence of illegal governmental "encouragement" of private segregated schools, such schools would not "elect to forgo" their favorable tax treatment, and that this will "result in the availability" to complainants of an integrated educational system? See *Green* v. *Kennedy,* 309 F. Supp. 1127 (DC 1970), later decision reported *sub nom. Green* v. *Connally,* 330 F. Supp. 1150, summarily aff'd *sub nom. Coit* v. *Green,* 404 U. S. 997 (1971).[11] Or will black Americans be required to plead and show that in the absence of illegal governmental encouragement, private institutions would not "elect to

[11] I note that this Court summarily affirmed in *Coit* v. *Green,* a case in which the standing issue was expressly raised on appeal. See Jurisdictional Statement 11 in No. 71–425, O. T. 1971. The court below in that case found standing without any such gratuitous allegations or showings respecting injury in fact. 309 F. Supp., at 1132.

forgo" favorable tax treatment, and that this will "result in the availability" to complainants of services previously denied? See *McGlotten* v. *Connally*, 338 F. Supp. 448 (DC 1972); *Pitts* v. *Wisconsin Dept. of Revenue*, 333 F. Supp. 662 (ED Wis. 1971). As perusal of these reported decisions reveals, the lower courts have not assumed that such allegations and proofs were somehow required by Art. III.

C

Of course, the most disturbing aspect of today's opinion is the Court's insistence on resting its decision regarding standing squarely on the irreducible Art. III minimum of injury in fact, thereby effectively placing its holding beyond congressional power to rectify. Thus, any time Congress chooses to legislate in favor of certain interests by setting up a scheme of incentives for third parties, judicial review of administrative action that allegedly frustrates the congressionally intended objective will be denied, because any complainant will be required to make an almost impossible showing. Clearly the Legislative Branch of the Government cannot supply injured individuals with the means to make the factual showing in a specific context that the Court today requires. More specific indications of a congressional desire to confer standing upon such individuals would be germane, not to the Art. III injury-in-fact requirement, but only to the Court's "zone of interests" test for standing, that branch of standing lore which the Court assiduously avoids reaching. *Ante*, at 39 n. 19.[12]

[12] This is apparently the point the Court wishes to drive home by means of the following statement, *ante*, at 41 n. 22:

"The reference in *Linda R. S.* to 'a statute expressly conferring standing' was in recognition of Congress' power to create new interests the invasion of which will confer standing. . . . When

In our modern-day society, dominated by complex legislative programs and large-scale governmental involvement in the everyday lives of all of us, judicial review of administrative action is essential both for protection of individuals illegally harmed by that action, *Flast* v. *Cohen*, 392 U. S. 83, 111 (1968) (Douglas, J., concurring), and to ensure that the attainment of congressionally mandated goals is not frustrated by illegal action, *Barlow* v. *Collins*, 397 U. S., at 173–175, and n. 9 (opinion of BRENNAN, J.). See Albert, 83 Yale L. J., *supra*, n. 8, at 451–456. In dissenting from the Court's earlier creation of the "zone of interests" test applicable to standing for review under the Administrative Procedure Act, an inquiry that confuses standing with aspects of reviewability and the merits, I said:

> "[I]n my view alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of 'standing.' The books are full of opinions that dismiss a plaintiff for lack of 'standing' when dismissal, if proper at all, actually rested either upon the plaintiff's failure to prove on the merits the existence of the legally protected interest that he claimed, or on his failure to prove that the challenged agency action

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Congress has so acted, the requirements of Art. III remain: 'the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.'"

was reviewable at his instance." *Barlow* v. *Collins*, *supra*, at 176.[13]

Today, however, the Court achieves an even worse result through its manipulation of injury in fact, stretching that conception far beyond the narrow bounds within which it usefully measures a dimension of Art. III justiciability. The Court's treatment of injury in fact without any "particularization" in light of either the policies properly implicated or our relevant precedents threatens that it shall "become a catchall for an unarticulated discretion on the part of this Court" to insist that the federal courts "decline to adjudicate" claims that it prefers they not hear. *Poe* v. *Ullman*, 367 U. S., at 530 (Harlan, J., dissenting).

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[13] See also Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450, 469 (1970). After today's decision the lower courts will understandably continue to lament the intellectual confusion created by this Court under the rubric of the law of standing. *E. g.*, *Scanwell Laboratories* v. *Shaffer*, 137 U. S. App. D. C. 371, 373, 424 F. 2d 859, 861 (1970): "The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a 'complicated specialty of federal jurisdiction.' . . . One cannot help asking why this should be true."

Syllabus

MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* DIAZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 73–1046. Argued January 13, 1975—Reargued January 12, 1976—Decided June 1, 1976

Title 42 U. S. C. § 1395*o* (2) qualifies for enrollment in the Medicare supplemental medical insurance program residents of the United States who are 65 or older, but in subsection (B) denies eligibility to aliens unless they have been admitted for permanent residence and also have resided in the United States for at least five years. Appellee Diaz filed a class action suit in the District Court attacking the constitutionality of § 1395*o* (2)(B), and thereafter the District Court granted leave to add appellees Clara and Espinosa as plaintiffs and to file an amended complaint, which alleged that Clara had been disqualified for the same reasons as Diaz (lack of citizenship, nonadmission for permanent residence, and inability to meet the five-year residence requirement), but explained that Espinosa, though lawfully admitted for permanent residence, had not attempted to enroll because he could not meet the durational residence requirement. Appellant filed a motion to dismiss on the ground that appellees had not exhausted their administrative remedies. Two days later, Espinosa applied for enrollment and so advised the court. Though none of the appellees completely exhausted available avenues for administrative review, appellant acknowledged that the applications of Diaz and Clara raised no disputed factual issues and that the interlocutory denials of their applications should be treated as final for purposes of this litigation, and conceded that Espinosa's application could not be allowed under the statute. The District Court overruled appellant's motion and held that the five-year residence requirement violated due process and that, since it could not be severed from the requirement of admission for permanent residence, the alien-eligibility provisions of § 1395*o* (2)(B) were entirely unenforceable. *Held:*

1. The District Court had jurisdiction over Espinosa's claim, which (unlike the other appellees' claims) squarely raises the question of the constitutionality of the five-year residence requirement. Pp. 74–77.

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(a) Espinosa's filing of an application, though not made until he had become a party, met the nonwaivable jurisdictional condition imposed by 42 U. S. C. § 405 (g) that a claim for benefits under the Social Security Act shall have been presented to the Secretary of Health, Education, and Welfare, and the pleadings may be treated as properly supplemented by appellant's stipulation that Espinosa had filed an application. P. 75.

(b) Appellant's stipulation that Espinosa's application would be denied for failure to meet the durational residence requirement was tantamount to a denial of the application and constituted a waiver of the exhaustion requirements, and thus satisfied the statutory requirement of a hearing and final decision. *Weinberger* v. *Salfi*, 422 U. S. 749. Cf. *Weinberger* v. *Wiesenfeld*, 420 U. S. 640 n. 6, 641 n. 8. Pp. 75–77.

2. The statutory classification in § 1395*o* (2)(B) does not deprive appellees of liberty or property in violation of the Due Process Clause of the Fifth Amendment. Pp. 77–87.

(a) Congress, which has broad power over immigration and naturalization and regularly makes rules regarding aliens that would be unacceptable if applied to citizens, has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens; the real question here is not whether discrimination between aliens and citizens is permissible, as it clearly is, but whether the statutory discrimination *within* the class of aliens is permissible. Pp. 77–80.

(b) The political branches of government have considerable flexibility in responding to changing world conditions, and judicial review of decisions made by the Congress or the President in the area of immigration and naturalization is narrow. The party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others. Pp. 81–82.

(c) This case essentially involves only a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind. The requirements chosen by Congress render eligible those aliens who may reasonably be assumed to have a greater affinity with the United States and this Court is especially reluctant to question such a policy choice of degree. Pp. 82–84.

361 F. Supp. 1, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Harriet S. Shapiro reargued the cause for appellant. With her on the brief on reargument were *Solicitor General Bork, Assistant Attorney General Lee,* and *David M. Cohen.* On the brief on the original argument were *Solicitor General Bork, Assistant Attorney General Hills, Gerald P. Norton,* and *Mr. Cohen.*

Bruce S. Rogow argued the cause and filed a brief for appellees on reargument. *Alfred Feinberg* argued the cause and filed a brief for appellees on the original argument.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented by the Secretary's appeal is whether Congress may condition an alien's eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence. The District Court held that the first condition was unconstitutional and that it could not be severed from the second. Since we conclude that both conditions are constitutional, we reverse.

Each of the appellees is a resident alien who was lawfully admitted to the United States less than five years ago. Appellees Diaz and Clara are Cuban refugees who remain in this country at the discretion of the Attorney General; appellee Espinosa has been admitted for per-

*Briefs of *amici curiae* urging affirmance were filed by *Jack Wasserman* and *Esther Kaufman* for the Association of Immigration and Nationality Lawyers; by *Robert Allen Sedler* and *Melvin L. Wulf* for the American Civil Liberties Union; by *Jonathan A. Weiss* for Legal Services for the Elderly Poor; and by *Edith Lowenstein* for Migration and Refugee Services, U. S. Catholic Conference, Inc., et al.

manent residence. All three are over 65 years old and have been denied enrollment in the Medicare Part B supplemental medical insurance program established by § 1831 *et seq.* of the Social Security Act of 1935, 49 Stat. 620, as added, 79 Stat. 301, and as amended, 42 U. S. C. § 1395j *et seq.* (1970 ed. and Supp. IV).[1] They brought this action to challenge the statutory basis for that denial. Specifically, they attack 42 U. S. C. § 1395*o* (2) (1970 ed., Supp. IV), which grants eligibility to resident citizents who are 65 or older but denies eligibility to comparable aliens unless they have been admitted for permanent residence and also have resided in the United States for at least five years.[2] Appellees Diaz and Clara meet neither requirement; appellee Espinosa meets only the first.

On August 18, 1972, Diaz filed a class action complaint in the United States District Court for the Southern

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[1] The Medicare Part B medical insurance program for the aged covers a part of the cost of certain physicians' services, home health care, outpatient physical therapy, and other medical and health care. 42 U. S. C. § 1395k (1970 ed. and Supp. IV). The program supplements the Medicare Part A hospital insurance plan, § 1811 *et seq.* of the Social Security Act of 1935, 49 Stat. 620, as added, 79 Stat. 291, and as amended, 42 U. S. C. § 1395c *et seq.* (1970 ed. and Supp. IV), and it is financed in equal parts by the United States and by monthly premiums paid by individuals aged 65 or older who choose to enroll. 42 U. S. C. § 1395r (b) (1970 ed., Supp. IV).

[2] Title 42 U. S. C. § 1395*o* (1970 ed. and Supp. IV) provides:

"Every individual who—(1) is entitled to hospital insurance benefits under Part A, or (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, is eligible to enroll in the insurance program established by this part."

This case does not raise any issues involving subsection (1).

District of Florida alleging that his application for enrollment had been denied on the ground that he was not a citizen and had neither been admitted for permanent residence nor resided in the United States for the immediately preceding five years. He further alleged that numerous other persons had been denied enrollment in the Medicare Part B program for the same reasons. He sought relief on behalf of a class of persons who have been or will be denied enrollment in the Medicare insurance program for failure to meet the requirements of 42 U. S. C. § 1395*o* (2) (1970 ed., Supp. IV). Since the complaint prayed for a declaration that § 1395*o* (2) was unconstitutional and for an injunction requiring the Secretary to approve all applicants who had been denied eligibility solely for failure to comply with its requirements, a three-judge court was constituted.

On September 28, 1972, the District Court granted leave to add Clara and Espinosa as plaintiffs and to file an amended complaint. That pleading alleged that Clara had been denied enrollment for the same reasons as Diaz, but explained that Espinosa, although a permanent resident since 1971, had not attempted to enroll because he could not meet the durational residence requirement, and therefore any attempt would have been futile. The amended complaint sought relief on behalf of a subclass represented by Espinosa—that is, aliens admitted for permanent residence who have been or will be denied enrollment for failure to meet the five-year continuous residence requirement—as well as relief on behalf of the class represented by Diaz and Clara.[3]

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[3] The District Court certified a class and a subclass, defined, respectively, as follows:

"All immigrants residing in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U. S. C. § 1395j et seq. (1970), because they are not aliens lawfully

On October 24, 1972, the Secretary moved to dismiss the complaint on the ground, among others, that the District Court lacked jurisdiction over the subject matter because none of the plaintiffs had exhausted his administrative remedies under the Social Security Act. Two days later, on October 26, 1972, Espinosa filed his application for enrollment with the Secretary. He promptly brought this fact to the attention of the District Court, without formally supplementing the pleadings.

None of the appellees completely exhausted available avenues for administrative review. Nevertheless, the

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admitted for permanent residence who have resided in the United States continuously during the five years immediately preceding the month in which they apply for enrollment as required by [42 U. S. C. § 1395*o* (2)(B) (1970 ed., Supp. IV)].

. . . . . .

"All immigrants lawfully admitted for permanent residence in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U. S. C. § 1395j et seq. (1970), solely because of their failure to meet the five-year continuous residency requirement of [42 U. S. C. § 1395*o* (2)(B) (1970 ed., Supp. IV)]." *Diaz* v. *Weinberger*, 361 F. Supp., 1, 7 (1973) (footnote omitted).

These class certifications are erroneous. The District Court did not possess jurisdiction over the claims of the members of the plaintiff class and subclass who "will be denied" enrollment. Those who "will be denied" enrollment, as the quoted phrase is used in the certification, are those who have yet to be denied enrollment by formal administrative decision. See *id.*, at 6–7, and n. 7. But the complaint does not allege, and the record does not show, that the Secretary has taken any action with respect to such persons that is tantamount to a denial. It follows that the District Court lacked jurisdiction over their claims, see *Weinberger* v. *Salfi*, 422 U. S. 749, 764, and that the class and subclass are too broadly defined. In view of our holding that the statute is constitutional, we need not decide whether a narrower class and subclass could have been properly certified.

Secretary acknowledged that the applications of Diaz and Clara raised no disputed issues of fact and therefore the interlocutory denials of their applications should be treated as final for the purpose of this litigation. This satisfied the jurisdictional requirements of 42 U. S. C. § 405 (g). *Weinberger* v. *Salfi*, 422 U. S. 749, 763–767; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 641 n. 8. The Secretary did not make an equally unambiguous concession with respect to Espinosa, but in colloquy with the court he acknowledged that Espinosa had filed an application which could not be allowed under the statute.[4] The District Court overruled the Secretary's motion to dismiss and decided the merits on cross-motions for summary judgment.

The District Court held that the five-year residence requirement violated the Due Process Clause of the Fifth Amendment[5] and that since it could not be severed from the requirement of admission for permanent residence, the alien-eligibility provisions of § 1395*o* (2)(B) were entirely unenforceable. *Diaz* v. *Weinberger*, 361 F. Supp. 1 (1973). The District Court reasoned that "even though fourteenth amendment notions of equal protection are not entirely congruent with fifth amendment concepts of due process," *id.*, at 9, the danger of unjustifiable discrimination against aliens in the enactment of welfare programs is so great, in view of their complete lack of representation in the political process, that this federal statute should be tested under the same pledge of equal protection as a state statute. So tested, the court concluded that the statute was invalid because it was not both rationally based and free from invidious discrimination. It rejected the desire to preserve the fis-

[4] See *infra*, at 76–77, and n. 11.

[5] "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 5.

cal integrity of the program, or to treat some aliens as less deserving than others, as adequate justification for the statute. Accordingly, the court enjoined the Secretary from refusing to enroll members of the class and subclass represented by appellees.

The Secretary appealed directly to this Court.[6] We noted probable jurisdiction. *Weinberger* v. *Diaz*, 416 U. S. 980. After hearing argument last Term, we set the case for reargument. 420 U. S. 959. We now consider (1) whether the District Court had jurisdiction over Espinosa's claim; (2) whether Congress may discriminate in favor of citizens and against aliens in providing welfare benefits; and (3) if so, whether the specific discriminatory provisions in § 1395*o* (2)(B) are constitutional.

I

Espinosa's claim squarely raises the question whether the requirement of five years' continuous residence is constitutional, a question that is not necessarily presented by the claims of Diaz and Clara. For if the requirement of admission for permanent residence is valid, their applications were properly denied even if the durational residence requirement is ineffective.[7] We

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[6] The Secretary asserted jurisdiction in this Court by direct appeal under 28 U. S. C. §§ 1252, 1253. Since we possess jurisdiction under § 1252, which provides for direct appeal to this Court from a judgment of a federal court holding a federal statute unconstitutional in a civil action to which a federal officer is a party, we need not decide whether an appeal lies under § 1253. *Weinberger* v. *Salfi*, *supra*, at 763 n. 8.

[7] Diaz and Clara contend that the requirement of lawful admission for permanent residence should be construed so that it is satisfied by aliens, such as they, who have been paroled into the United States at the discretion of the Attorney General. However, such aliens remain in the United States at the discretion of the Attorney General, 8 U. S. C. § 1182 (d)(5), and hence cannot have been "lawfully admitted for permanent residence," as § 1395*o* (2)(B) requires.

must therefore decide whether the District Court had jurisdiction over Espinosa's claim.

We have little difficulty with Espinosa's failure to file an application with the Secretary until after he was joined in the action. Although 42 U. S. C. § 405 (g) establishes filing of an application as a nonwaivable condition of jurisdiction, *Mathews* v. *Eldridge,* 424 U. S. 319, 328; *Weinberger* v. *Salfi,* 422 U. S., at 764, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue;[8] since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact.[9] Under these circumstances, we treat the pleadings as properly supplemented by the Secretary's stipulation that Espinosa had filed an application.

A further problem is presented by the absence of any formal administrative action by the Secretary denying Espinosa's application. Section 405 (g) requires a final decision by the Secretary after a hearing as a prerequisite of jurisdiction. *Mathews* v. *Eldridge, supra,* at 328–330; *Weinberger* v. *Salfi, supra,* at 763–765. However,

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[8] Fed. Rule Civ. Proc. 15 (d); *Security Ins. Co. of New Haven* v. *United States ex rel. Haydis,* 338 F. 2d 444, 447–449 (CA9 1964).

[9] "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U. S. C. § 1653. Although the defect in Espinosa's allegations must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case. See *Schlesinger* v. *Councilman,* 420 U. S. 738, 744 n. 9; *Willingham* v. *Morgan,* 395 U. S. 402, 407–408, and n. 3. Despite Espinosa's failure to supplement the complaint, the District Court was aware that he had filed his application; since the Secretary stipulated that the application had been filed, the defect in the pleadings surely did not prejudice him.

we held in *Salfi* that the Secretary could waive the exhaustion requirements which this provision contemplates and that he had done so in that case. *Id.*, at 765–767; accord, *Mathews* v. *Eldridge*, *supra*, at 328–330 (dictum); *Weinberger* v. *Wiesenfeld*, 420 U. S., at 641 n. 8. We reach a similar conclusion here.

The plaintiffs in *Salfi* alleged that their claims had been denied by the local and regional Social Security offices and that the only question was one of constitutional law, beyond the competence of the Secretary to decide. These allegations did not satisfy the exhaustion requirements of § 405 (g) or the Secretary's regulations, but the Secretary failed to challenge the sufficiency of the allegations on this ground. We interpreted this failure as a determination by the Secretary that exhaustion would have been futile and deferred to his judgment that the only issue presented was the constitutionality of a provision of the Social Security Act.

The same reasoning applies to the present case. Although the Secretary moved to dismiss for failure to exhaust administrative remedies, at the hearing on the motion he stipulated that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only issue before the District Court was the constitutionality of the statute.[10] As in *Salfi*, this constitutional question is beyond the Secretary's competence. Indeed, the Secretary has twice stated in this Court that he stipulated in the District Court that Espinosa's application would be denied for failure to meet the durational residence requirement.[11] For jurisdictional purposes, we

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[10] Record on Appeal 224–227. See Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, Record on Appeal 259–260.

[11] Jurisdictional Statement 3 n. 3; Brief for Appellant 5 n. 5. In his Supplemental Brief, filed after our decision in *Salfi*, the

treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements. Cf. *Weinberger* v. *Wiesenfeld, supra,* at 640 n. 6, 641 n. 8.

We conclude, as we did in *Salfi,* that the Secretary's submission of the question for decision on the merits by the District Court satisfied the statutory requirement of a hearing and final decision. We hold that Espinosa's claim, as well as the claims of Diaz and Clara, must be decided.

II

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 48–51; *Wong Wing* v. *United States,* 163 U. S. 228, 238; see *Russian Fleet* v. *United States,* 282 U. S. 481, 489. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. *Wong Yang Sung, supra; Wong Wing, supra.*

Secretary argues that the District Court did not possess jurisdiction over Espinosa's claim because it was not until after the District Court had issued its injunction that the Secretary resolved an unspecified factual issue presented by Espinosa's application, and that such a belated confirmation that Espinosa's application should be denied could not confer jurisdiction upon the District Court *nunc pro tunc.* Supplemental Brief for Appellant 4, and n. 1. However, the District Court's jurisdiction was not founded upon the Secretary's subsequent confirmation that Espinosa's application should be denied, but rather upon the Secretary's stipulation in the District Court that no factual issues remained, that the case was ripe for disposition by summary judgment, and that the only issue was the constitutionality of the statute. Even though *Salfi* had not been decided when he so stipulated, he is not now free to withdraw his stipulation, and no reason appears why he should be permitted to do so.

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; [12] and the class of aliens is itself a heter-

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[12] The Constitution protects the privileges and immunities only of citizens, Amdt. 14, § 1; see Art. IV, § 2, cl. 1, and the right to vote only of citizens. Amdts. 15, 19, 24, 26. It requires that Representatives have been citizens for seven years, Art. I, § 2, cl. 2, and Senators citizens for nine, Art. I, § 3, cl. 3, and that the President be a "natural born Citizen." Art. II, § 1, cl. 5.

A multitude of federal statutes distinguish between citizens and aliens. The whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens. These include prohibitions and restrictions upon Government employment of aliens, *e. g.*, 10 U. S. C. § 5571; 22 U. S. C. § 1044 (e), upon private employment of aliens, *e. g.*, 10 U. S. C. § 2279; 12 U. S. C. § 72, and upon investments and businesses of aliens, *e. g.*, 12 U. S. C. § 619; 47 U. S. C. § 17; statutes excluding aliens from benefits available to citizens, *e. g.*, 26 U. S. C. § 931 (1970 ed. and Supp. IV); 46 U. S. C. § 1171 (a), and from protections extended to citizens, *e. g.*, 19 U. S. C. § 1526; 29 U. S. C. § 633a (1970 ed., Supp. IV); and statutes imposing added burdens upon aliens, *e. g.*, 26 U. S. C. § 6851 (d); 28 U. S. C. § 1391 (d). Several statutes treat certain aliens more favorably than citizens. *E. g.*, 19 U. S. C. § 1586 (e); 50 U. S. C. App. § 453 (1970 ed., Supp. IV). Other statutes, similar to the one at issue in this case, provide for equal treatment of citizens and aliens lawfully admitted for permanent residence. 10 U. S. C. § 8253; 18 U. S. C. § 613 (2) (1970 ed., Supp. IV). Still others equate citizens and aliens who have declared their intention to become citizens. *E. g.*, 43 U. S. C. § 161; 30 U. S. C. § 22. Yet others condition equal treatment of an alien upon reciprocal treat-

ogeneous multitude of persons with a wide-ranging variety of ties to this country.[13]

In the exercise of its broad power over naturalization

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ment of United States citizens by the alien's own country. *E. g.*, 10 U. S. C. § 7435 (a); 28 U. S. C. § 2502.

[13] The classifications among aliens established by the Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* (1970 ed. and Supp. IV), illustrate the diversity of aliens and their ties to this country. Aliens may be immigrants or nonimmigrants. 8 U. S. C. § 1101 (a)(15). Immigrants, in turn, are divided into those who are subject to numerical limitations upon admissions and those who are not. The former are subdivided into preference classifications which include: grown unmarried children of citizens; spouses and grown unmarried children of aliens lawfully admitted for permanent residence; professionals and those with exceptional ability in the sciences or arts; grown married children of citizens; brothers and sisters of citizens; persons who perform specified permanent skilled or unskilled labor for which a labor shortage exists; and certain victims of persecution and catastrophic natural calamities who were granted conditional entry and remained in the United States at least two years. 8 U. S. C. §§ 1153 (a)(1)–(7). Immigrants not subject to certain numerical limitations include: children and spouses of citizens and parents of citizens at least 21 years old; natives of independent countries of the Western Hemisphere; aliens lawfully admitted for permanent residence returning from temporary visits abroad; certain former citizens who may reapply for acquisition of citizenship; certain ministers of religion; and certain employees or former employees of the United States Government abroad. 8 U. S. C. §§ 1101 (a)(27), 1151 (a), (b). Nonimmigrants include: officials and employees of foreign governments and certain international organizations; aliens visiting temporarily for business or pleasure; aliens in transit through this country; alien crewmen serving on a vessel or aircraft; aliens entering pursuant to a treaty of commerce and navigation to carry on trade or an enterprise in which they have invested; aliens entering to study in this country; certain aliens coming temporarily to perform services or labor or to serve as trainees; alien representatives of the foreign press or other information media; certain aliens coming temporarily to participate in a program in their field of study or specialization; aliens engaged to be married to citizens; and certain alien employees entering temporarily to continue to render services to the same

and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens [14] and the reservation of the power to deport [15] have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry.[16] The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."

In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.

The real question presented by this case is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible. We turn to that question.

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employers. 8 U. S. C. § 1101 (a)(15). In addition to lawfully admitted aliens, there are, of course, aliens who have entered illegally.

[14] *Kleindienst* v. *Mandel*, 408 U. S. 753, 765–770.

[15] *Galvan* v. *Press*, 347 U. S. 522, 530–532; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 584–591.

[16] See *Zemel* v. *Rusk*, 381 U. S. 1, 13–16; *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505–514; *Kent* v. *Dulles*, 357 U. S. 116, 125–130.

III

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.[17] Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication. Appellees Diaz and Clara are but two of over 440,000 Cuban refugees who arrived in the United States between 1961 and 1972.[18] And the Cuban parolees are but one of several categories of aliens who have been admitted in order to make a humane response to a natural catastrophe or an international political situation.[19] Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.[20] The reasons

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[17] "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy, supra,* at 588–589 (footnote omitted). Accord, *e. g., Kleindienst* v. *Mandel, supra,* at 765–767; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711–713.

[18] Cuban Refugee Center—Weekly Statistical Report for November 13–17, 1972, App. 40.

[19] See 8 U. S. C. §§ 1153 (a)(7), 1182 (d)(5).

[20] An unlikely, but nevertheless possible, consequence of holding

that preclude judicial review of political questions [21] also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

Since it is obvious that Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others. In this case the appellees have challenged two requirements—first, that the alien be admitted as a permanent resident, and, second, that his residence be of a duration of at least five years. But if these requirements were eliminated, surely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally entitled to benefits, *some* durational requirement would certainly be appropriate. In short, it

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that appellees are constitutionally entitled to welfare benefits would be a further extension of similar benefits to over 440,000 Cuban parolees.

[21] "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibilty of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker* v *Carr*, 369 U. S. 186, 217.

is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence. Since neither requirement is wholly irrational, this case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind.

We may assume that the five-year line drawn by Congress is longer than necessary to protect the fiscal integrity of the program.[22] We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not.

The task of classifying persons for medical benefits, like the task of drawing lines for federal tax purposes, inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the

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[22] The District Court held that the durational residence requirement was not rationally related to maintaining the fiscal integrity of the Medicare Part B program because the program is financed on a "current cost" basis, half by appropriations from the general revenues and half by premiums from enrolled individuals; because aliens who do not meet the residence requirement would constitute no greater burden on the general revenues than enrolled citizens who have not paid federal taxes or who pay their premiums from federally subsidized welfare benefits; because aliens, like citizens, must pay federal taxes; and because the residency requirement only postpones treatment of aliens until costlier medical care is necessary. *Diaz* v. *Weinberger*, 361 F. Supp., at 10–12.

209-004 O - 75 - 9

eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment.[23] In this case, since appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in the supplementary insurance program on the same conditions as citizens. We decline the invitation.

IV

The cases on which appellees rely are consistent with our conclusion that this statutory classification does not deprive them of liberty or property without due process of law.

Graham v. *Richardson*, 403 U. S. 365, provides the strongest support for appellees' position. That case holds that state statutes that deny welfare benefits to resident aliens, or to aliens not meeting a requirement of durational residence within the United States, violate the Equal Protection Clause of the Fourteenth Amendment and encroach upon the exclusive federal power over the entrance and residence of aliens. Of course, the latter ground of decision actually supports our holding today that it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens. The equal protection analysis also involves significantly different considerations because it concerns the relationship between

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[23] *Weinberger* v. *Salfi*, 422 U. S., at 768–774; *Dandridge* v. *Williams*, 397 U. S. 471, 483–487.

aliens and the States rather than between aliens and the Federal Government.

Insofar as state welfare policy is concerned,[24] there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.[25]

The distinction between the constitutional limits on state power and the constitutional grant of power to the Federal Government also explains why appellees' reliance on *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, is misplaced. That case involved Arizona's requirement of durational residence within a county in order to receive nonemergency medical care at the

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[24] We have left open the question whether a State may prohibit aliens from holding elective or important nonelective positions or whether a State may, in some circumstances, consider the alien status of an applicant or employee in making an individualized employment decision. See *Sugarman* v. *Dougall*, 413 U. S. 634, 646–649; *In re Griffiths*, 413 U. S. 717, 728–729, and n. 21.

[25] "State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." *Graham* v. *Richardson*, 403 U. S. 365, 380.

county's expense. No question of alienage was involved. Since the sole basis for the classification between residents impinged on the constitutionally guaranteed right to travel within the United States, the holding in *Shapiro* v. *Thompson,* 394 U. S. 618, required that it be justified by a compelling state interest.[26] Finding no such justification, we held that the requirement violated the Equal Protection Clause. This case, however, involves no state impairment of the right to travel—nor indeed any impairment whatever of the right to travel within the United States; the predicate for the equal protection analysis in those cases is simply not present. Contrary to appellees' characterization, it is not "political hypocrisy" to recognize that the Fourteenth Amendment's

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[26] In *Shapiro* v. *Thompson,* we held that state-imposed requirements of durational residence within the State for receipt of welfare benefits denied equal protection because such requirements unconstitutionally burdened the right to travel interstate. Since the requirements applied to aliens and citizens alike, we did not decide whether the right to travel interstate was conferred only upon citizens. However, our holding was predicated expressly on the requirement "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." 394 U. S., at 629. See *Graham* v. *Richardson, supra,* at 375–376, 377–380.

Appellees also gain no support from *Washington* v. *Legrant,* 394 U. S. 618, a case decided with *Shapiro* v. *Thompson. Legrant* involved a congressionally imposed requirement of one year's residence within the District of Columbia for receipt of welfare benefits. As in *Shapiro* v. *Thompson,* no question of alienage was involved. We held that the requirement violated the Due Process Clause of the Fifth Amendment for the same reasons that the state-imposed durational residency requirements violated the Equal Protection Clause of the Fourteenth Amendment. 394 U. S., at 641–642. Unlike the situation in *Shapiro* and *Legrant,* the durational residency requirement in this case could at most deter only the travel of aliens into the United States. The power of Congress to prevent the travel of aliens into this country cannot seriously be questioned.

limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.

Finally, we reject the suggestion that *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, lends relevant support to appellees' claim. No question involving alienage was presented in that case. Rather, we found that the denial of food stamps to households containing unrelated members was not only unsupported by any rational basis but actually was intended to discriminate against certain politically unpopular groups. This case involves no impairment of the freedom of association of either citizens or aliens.

We hold that § 1395*o* (2)(B) has not deprived appellees of liberty or property without due process of law.

The judgment of the District Court is

Reversed.

HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* MOW SUN WONG ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-1596. Argued January 13, 1975—Reargued January 12, 1976—Decided June 1, 1976

The Civil Service Commission (CSC) regulation barring noncitizens, including lawfully admitted resident aliens, from employment in the federal competitive civil service *held* unconstitutional as depriving such resident aliens of liberty without due process of law in violation of the Fifth Amendment. Pp. 99–117.

(a) While overriding national interests may justify a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State, the federal power over aliens is not so plenary that any agent of the Federal Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens. When the Federal Government asserts an overriding national interest to justify a discriminatory rule that would violate the Equal Protection Clause of the Fourteenth Amendment if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. Pp. 99–105.

(b) While the CSC's policy of conditioning eligibility for employment in the federal civil service on citizenship has been considered by Congress in certain Appropriation Acts imposing various limitations on the classes of employees who may receive compensation from the Federal Government and by various Presidents in Executive Orders relating to the CSC's authority to establish standards for federal employment, those Appropriation Acts and Executive Orders cannot fairly be construed to evidence either approval or disapproval of the CSC regulation in question. Pp. 105–114.

(c) Assuming without deciding that an explicit determination by Congress or the President to exclude all noncitizens from the federal service would be adequately supported by the national interests of (1) providing the President with an expendable token for treaty negotiation purposes, (2) offering aliens an incentive to

become naturalized, and (3) having, for the sake of administrative convenience, one simple rule excluding all noncitizens from employment when citizenship is clearly an appropriate and legitimate requirement for some important and sensitive positions, such interests cannot provide an acceptable rationalization for such a determination by the CSC. The first two are not matters that properly concern the CSC. The third interest is likewise unacceptable, where it does not appear that the CSC fully evaluated the relative desirability of a simple exclusionary rule on the one hand or the value to the service of enlarging the pool of eligible employees on the other, and where it cannot be reasonably inferred that the administrative burden of establishing the job classifications for which citizenship is an appropriate requirement would be particularly onerous. More significantly, in view of the quality of the interest at stake, any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the CSC's indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires rejection of administrative convenience as justification for the regulation. Pp. 114–116.

(d) Since alien residents are admitted as a result of decisions made by Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General, due process requires that the decision to deprive such residents of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the CSC, that it be justified by reasons that are the proper concern of that agency. P. 116.

500 F. 2d 1031, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BRENNAN, J., filed a concurring statement, in which MARSHALL, J., joined, *post*, p. 117. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and BLACKMUN, JJ., joined, *post*, p. 117.

Solicitor General Bork reargued the cause for petitioners. With him on the briefs were *Assistant Attorney General Hills, Louis F. Claiborne, Gerald P. Norton,* and *Bruno A. Ristau.*

Edward H. Steinman, by appointment of the Court, 423 U. S. 921, reargued the cause for respondents. With him on the brief were *David C. Moon* and *Kenneth Hecht*.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

Five aliens, lawfully and permanently residing in the United States, brought this litigation to challenge the validity of a policy, adopted and enforced by the Civil Service Commission and certain other federal agencies, which excludes all persons except American citizens and natives of American Samoa from employment in most positions subject to their respective jurisdictions.[1] Because the policy, the law, and the identity of the parties have changed somewhat since the litigation commenced,

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*Briefs of *amici curiae* urging affirmance were filed by *Robert Allen Sedler* and *Melvin L. Wulf* for the American Civil Liberties Union; by *Vilma S. Martinez* and *Sanford Jay Rosen* for the Mexican-American Legal Defense and Educational Fund et al.; and by Sandigan et al.

[1] The Civil Service Commission's regulations, 5 CFR § 338.101 (1976), provide in pertinent part:

"(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

"(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute."

Apparently the only persons other than citizens who owe *permanent* allegiance to the United States are noncitizen "nationals." See 8 U. S. C. §§ 1101 (a)(21), (22), 1408. The Solicitor General has advised us that the Commission construes the phrase as covering only natives of American Samoa. Brief for Petitioners 81 n. 67.

we state the facts in detail before addressing the important question which we granted certiorari to resolve. 417 U. S. 944.

I

Each of the five plaintiffs was denied federal employment solely because of his or her alienage. They were all Chinese residents of San Francisco and each was qualified for an available job.

After performing satisfactory work for the Post Office Department for 10 days, respondent Kae Cheong Lui was terminated because his personnel record disclosed that he was not a citizen.[2] Respondents Mow Sun Wong and Siu Hung Mok also demonstrated their ability to perform on the job; they both participated in the California Supplemental Training and Education Program (STEP) and were assigned to federal agencies until the STEP program ended. As a noncitizen, Mow Sun Wong, who had been an electrical engineer in China, was ineligible for employment as a janitor for the General Services Administration. Siu Hung Mok, who had 18 years' experience as a businessman in China, could not retain his job as a file clerk with the Federal Records Center of GSA.

Respondent Francene Lum was not permitted to take an examination for a position as evaluator of educational programs in the Department of Health, Education, and Welfare. Her background included 15 years of teaching experience, a master's degree in education, and periods of graduate study at four universities. Anna Yu, the fifth plaintiff, who is not a respondent because she did not join in the appeal from the adverse decision of the District

[2] The termination letter, dated October 19, 1970, read:

"Your personnel records indicate that you are not a citizen of the United States. Therefore, it is necessary to terminate your services effective close of business October 20/1970 in accordance with the Postal Manual Regulations 711.531."

Court, sought a position as a clerk-typist, but could not take the typing test because she was not a citizen.

Two of the plaintiffs, Mow Sun Wong and Siu Hung Mok, had filed declarations of intent to become citizens; the other three had not. They were all lawfully admitted, Francene Lum in 1946, Anna Yu in 1965, Siu Hung Mok and Kae Cheong Lui in 1968, and Mow Sun Wong in 1969.

On December 22, 1970, they commenced this class action in the Northern District of California. As defendants they named the Chairman and the Commissioners of the Civil Service Commission and the heads of the three agencies which had denied them employment.[3]

The complaint alleged that there are about four million aliens living in the United States; they face special problems in seeking employment because our culture, language, and system of government are foreign to them; about 300,000 federal jobs become available each year, but noncitizens are not permitted to compete for those jobs except in rare situations when citizens are not available or when a few positions exempted from the competitive civil service are being filled. Plaintiffs further alleged that the advantage given to citizens seeking federal civil service positions is arbitrary and violates the

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[3] The defendants named in the original complaint were Robert E. Hampton, Chairman, James E. Johnson, and L. J. Andolsek, Commissioners, Nicholas J. Oganovic, Executive Director, and Asa T. Briley, Regional Director, of the United States Civil Service Commission; Robert L. Kunzig, then Administrator, and Thomas Hannon, Regional Administrator, of the General Services Administration; Elliot Richardson, then Secretary, and Robert Coop, Regional Director, of the Department of Health, Education, and Welfare; and Winton Blount, then Postmaster General of the United States; Lim Poon Lee, Postmaster of the city and county of San Francisco; and Russel E. James, Regional Director of the United States Post Office Department.

Due Process Clause of the Fifth Amendment to the United States Constitution [4] and Executive Order No. 11,478, 3 CFR 803 (1966–1970 Comp.), which forbids discrimination in federal employment on the basis of "national origin." The complaint sought declaratory and injunctive relief.

Defendants moved to dismiss the complaint and plaintiffs filed motions for summary judgment supported by affidavits setting forth the facts stated above. The District Court rejected a challenge to its jurisdiction,[5] but ruled in favor of defendants on the merits. 333 F. Supp. 527. The District Court held that the reference to "national origin" in the Executive Order prohibited discrimination among citizens rather than discrimination between citizens and noncitizens. The court also rejected an argument that the Civil Service Commission regulation was inconsistent with § 502 of the Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act, 1970, which permitted payment to classes of persons who are made ineligible by the Civil Service regulation.[6] On that point the court said:

"The Commission has acted permissibly in relation

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[4] The Fifth Amendment to the Constitution of the United States provides:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[5] Judge Peckham held that jurisdiction was conferred by 28 U. S. C. § 1331. He found no merit in the argument that there had been no waiver of sovereign immunity; he was also satisfied that the action is one which "arises under" the Constitution and laws of the United States and that each plaintiff's claim satisfied the jurisdictional amount.

[6] Section 502 of the Act provides in pertinent part as follows: "[N]o part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee

> to the Appropriations Act in not opening up the civil service to all those whom Congress has indicated it would be willing to pay for their work." 333 F. Supp., at 531.

Finally, the District Court held that the Commission's discrimination against aliens was constitutional. The court noted that the federal power over aliens is "quite broad, almost plenary," and therefore the classification needed only a rational basis. *Ibid.* It identified two grounds upon which the President [7] could properly rely: First, that the formation of policy and its execution, at whatever level, should only be entrusted to United States citizens, or, alternatively, that "the Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens." *Id.*, at 532.

Four of the plaintiffs appealed. During the period of

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of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States . . . ." 83 Stat. 336.

[7] In using the term "Executive," it is clear that Judge Peckham intended to identify the President, rather than any of the defendant agency heads:

"It is quite rational and reasonable for the Executive, via a grant of power from the Legislature, to determine that the formation of policy and its execution, at whatever level, should be entrusted only to United States citizens. Moreover, as an alternative rational basis for the regulation herein, the Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens." 333 F. Supp., at 532.

over two years that the appeal was pending in the Ninth Circuit, we decided two cases that recognize the importance of protecting the employment opportunities of aliens.[8] In *Sugarman* v. *Dougall,* 413 U. S. 634, we held that a section of the New York Civil Service Law which provided that only United States citizens could hold permanent positions in the competitive class of the State's civil service violated the Equal Protection Clause of the Fourteenth Amendment; that Clause also provided the basis for our holding in *In re Griffiths,* 413 U. S. 717, decided on the same day, that Connecticut's exclusion of aliens from the practice of law was unconstitutional.

In this case, the Court of Appeals recognized that neither *Sugarman* nor *Griffiths* was controlling because the Fourteenth Amendment's restrictions on state power are not directly applicable to the Federal Government[9] and because Congress and the President have broad power over immigration and naturalization which the States do not possess.[10] Nevertheless, those decisions provided the Court of Appeals with persuasive reasons for rejecting the bases asserted by the defendants in the District Court as justifications for the Civil Service Commission's policy of discriminating against noncitizens. For we specifically held that the State's legitimate inter-

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[8] *Sugarman* v. *Dougall,* 413 U. S. 634, and *In re Griffiths,* 413 U. S. 717, were both decided on June 25, 1973. *Graham* v. *Richardson,* 403 U. S. 365, was decided on June 14, 1971, only a few weeks before the District Court decision.

[9] The Fourteenth Amendment, § 1, provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[10] Article I, § 8, cl. 4, of the Constitution of the United States provides:

"The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."

est in the undivided loyalty of the civil servant who participates directly in the formulation and execution of government policy, was inadequate to support a state restriction indiscriminately disqualifying the "sanitation man, class B," the typist, and the office worker, 413 U. S., at 641–643; moreover, we expressly considered, and rejected, New York's contention that its special interest in the advancement and profit of its own citizens could justify confinement of the State's civil service to citizens of the United States, *id.*, at 643–645.

The Court of Appeals reversed; it agreed with the District Court's analysis of the nonconstitutional issues, but held the regulation violative of the Due Process Clause of the Fifth Amendment. Although refusing to accept respondents' contention that the protection against federal discrimination provided by the Fifth Amendment is coextensive with that applicable to the States under the Equal Protection Clause of the Fourteenth Amendment, the court concluded that the Commission regulation which "sweeps indiscriminately excluding *all* aliens from *all* positions requiring the competitive Civil Service examination" could not be supported by justifications which related to only a small fraction of the positions covered by the rule. 500 F. 2d 1031, 1037. Thus, the court accepted the argument that citizenship might properly be required in positions involving policymaking decisions, or in positions involving national security interests, but the court was unwilling to support an extraordinarily broad exclusion on such narrow shoulders.

Only the Chairman and the Commissioners of the Civil Service Commission petitioned for certiorari. Several of the nonpetitioning defendants have no responsibility for the establishment of standards which applicants for federal employment must meet; accordingly, their participation is not necessary. The former Post-

master General is not now a necessary party for a different reason.

In 1971, after the litigation was commenced, Congress established a new Postal Service and removed its officers and employees from the jurisdiction of the Civil Service Commission.[11] For the first three years of its existence the new Postal Service retained substantially the same citizenship requirement for employees as did the Civil Service Commission.[12] However, in 1974, without any additional statutory authority or direction, the Postal Service amended its regulation to make all noncitizens who have been accorded permanent resident alien status in the United States eligible for all positions except those at a high executive level or those expressly designated as

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[11] Pub. L. 91–375, 84 Stat. 719. The technical amendment to Title 5 removed the officers and employees of the Postal Service and Postal Rate Commission from the definitions of officers and employees who are subject to civil service.

[12] During this period the Postal Service Personnel Handbook provided:

"317.3 Citizenship Requirements

".31 Applicability

".311 Except as provided in 317.312 below, only persons who are citizens of, or owe allegiance to the United States shall be given appointments in the Postal Service. Natives of American Samoa are the only noncitizens who, as a group, owe permanent allegiance to the United States.

".312 Regional Postmasters General may approve individual appointments of noncitizen nationals under unusual circumstances such as when qualified citizens are not available. These appointments will be subject to the individual prior approval of the Regional Postmaster General.

".32 Responsibility for Determining Citizenship

"The appointing officer is responsible for determining that all persons selected for appointment meet the citizenship requirement." Transmittal Letter 2, 8–18–72.

"sensitive." [13] Thus, although the case is not technically moot as regards the Postal Service,[14] that Service does not now have any interest in defending the challenged Civil Service regulation.

We granted certiorari to decide the following question presented by the petition:

"Whether a regulation of the United States Civil

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[13] The Postal Bulletin issued on May 2, 1974 substituted the following "citizenship requirements" for those quoted in n. 12, *supra:*

"317.3 Citizenship Requirements

".31 Noncitizens of the United States who have been accorded permanent resident alien status in the United States are eligible for appointment to all Postal Service positions other than positions in levels PES–20 and above, and positions designated by the Postal Service as sensitive. Natives of American Samoa are eligible for appointment to all Postal Service positions. Appointments of noncitizens to positions in levels PES–20 and above or to positions designated as sensitive can only be made with the prior approval of the appropriate Regional Postmaster General or an Assistant Postmaster General, in headquarters.

".32 The appointing officer may make his determination as to whether the appointee is a citizen of the United States on the basis of the eligible's sworn or affirmed statement, on Form 61, *Appointment Affidavit,* at the time of appointment. A noncitizen's permanent resident alien status shall be determined by reference to the appointee's Alien Registration Receipt Card (Form I–151), which the permanent resident alien is furnished by the Immigration and Naturalization Service.

".33 The appointing officer is responsible for determining that all persons selected for appointment meet the requirements of sections 317.31 and 317.32.

"Regional and local postal officials should take appropriate measures to insure that announcements and forms conform to the new policy, and that prospective applicants for postal employment are given correct information concerning the policy."

[14] Cf. *United States* v. *W. T. Grant Co.*, 345 U. S. 629. The Postal Service, in modifying its citizenship regulations (n. 13, *supra*), specifically indicated that it was doing so "[a]s a result of recent Federal litigation." Postal Bull., May 2, 1974, p. 2.

> Service Commission that bars resident aliens from employment in the federal competitive civil service is constitutional."

We now address that question.

II

Petitioners have chosen to argue on the merits a somewhat different question. In their brief, the petitioners rephrased the question presented as "[w]hether the Civil Service Commission's regulation . . . is within the constitutional powers of Congress and the President and hence not a constitutionally forbidden discrimination against aliens." [15]

This phrasing of the question assumes that the Commission regulation is one that was mandated by the Congress, the President, or both. On this assumption, the petitioners advance alternative arguments to justify the discrimination as an exercise of the plenary federal power over immigration and naturalization. First, the petitioners argue that the equal protection aspect of the Due Process Clause of the Fifth Amendment is wholly inapplicable to the exercise of federal power over aliens, and therefore no justification for the rule is necessary.[16] Alternatively, the petitioners argue that the Fifth Amendment imposes only a slight burden of justification on the Federal Government, and that such a burden is easily met by several factors not considered by the District Court or the Court of Appeals. Before addressing these arguments, we first discuss certain limitations

[15] Brief for Petitioners 2.

[16] The petitioners state:

"Our primary submission is that the decision to limit employment of noncitizens in the federal competitive civil service is likewise a matter beyond the reach of the equal protection principle." *Id.*, at 24-25.

209-204 O - 78 - 10

which the Due Process Clause places on the power of the Federal Government to classify persons subject to its jurisdiction.

The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see *Buckley* v. *Valeo*, 424 U. S. 1, 93, the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ,[17] but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause.[18]

In this case we deal with a federal rule having nationwide impact. The petitioners correctly point out that the paramount federal power over immigration and naturalization forecloses a simple extension of the holding in *Sugarman* as decisive of this case.[19] We agree

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[17] Since the Due Process Clause appears in both the Fifth and Fourteenth Amendments, whereas the Equal Protection Clause does not, it is quite clear that the primary office of the latter differs from, and is additive to, the protection guaranteed by the former.

[18] *Bolling* v. *Sharpe*, 347 U. S. 497; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500.

[19] In that case we did not reach the question whether New York's citizenship restriction was in conflict with Congress' comprehensive regulation of immigration and naturalization, see 413 U. S., at 646, where we cited *Graham* v. *Richardson*, 403 U. S., at 376–380, and we

with the petitioners' position that overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State.[20]

We do not agree, however, with the petitioners' primary submission that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens. We recognize that the petitioners' argument draws support from both the federal and the political character of the power over immigration and naturalization.[21]

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were careful to avoid intimating any view on the question raised in the case now before us. We stated:

"We are aware that citizenship requirements are imposed in certain aspects of the federal service. See 5 U. S. C. § 3301; Exec. Order No. 10577, 19 Fed. Reg. 7521, § 2.1 (1954); 5 CFR §§ 338.101, 302.203 (g) (1973); and, for example, Treasury, Postal Service, and General Government Appropriation Act, 1972, § 602, Pub. L. 92–49, 85 Stat. 122, and Public Works Appropriations Act, 1971, § 502, Pub. L. 91–439, 84 Stat. 902. In deciding the present case, we intimate no view as to whether these federal citizenship requirements are or are not susceptible of constitutional challenge. See *Jalil* v. *Hampton*, 148 U. S. App. D. C. 415, 460 F. 2d 923, cert. denied, 409 U. S. 887 (1972); Comment, Aliens and the Civil Service: A Closed Door?, 61 Geo. L. J. 207 (1972)." 413 U. S., at 646 n. 12.

[20] It should, of course, be noted that in *Sugarman* we merely held that the flat ban on the employment of aliens in positions that had little if any relation to a State's legitimate interests could not withstand scrutiny under the Equal Protection Clause, and we were careful to point out that the holding did not preclude individualized determinations that particular persons could be refused employment on the basis of noncitizenship, or that citizenship could be required as a qualification for appropriately defined classes of positions. See *id.*, at 646–647.

[21] It is important to note that the authority to control immigration is not only vested solely in the Federal Government, rather than the States, see *Truax* v. *Raich*, 239 U. S. 33, 42, but also that the power over aliens is of a political character and therefore sub-

Nevertheless, countervailing considerations require rejection of the extreme position advanced by the petitioners.

The rule enforced by the Commission has its impact on an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community.[22] Aliens are not entitled to vote and, as alleged in the complaint, are often handicapped by a lack of familiarity with our language and customs. The added disadvantage resulting from the enforcement of the rule—ineligibility for employment in a major sector of the economy—is of sufficient significance to be characterized as a deprivation of an interest in liberty.[23] Indeed, we deal with a

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ject only to narrow judicial review. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, where Mr. Justice Gray, writing for the Court, stated:

"The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene."

[22] Some of these disadvantages stem directly from the Constitution itself, see *Sugarman* v. *Dougall*, 413 U. S., at 651–653 (REHNQUIST, J., dissenting). The legitimacy of the delineation of the affected class buttresses the conclusion that it is "a 'discrete and insular' minority," see *In re Griffiths*, 413 U. S., at 721 and, of course, is consistent with the premise that the class is one whose members suffer special disabilities.

[23] See *Board of Regents* v. *Roth*, 408 U. S. 564, 573–574, and cases cited. See also the statement for the Court by Mr. Justice Hughes in *Truax* v. *Raich*, *supra*, a case dealing with the employment opportunities of aliens:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . . If this could be refused solely upon

rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. It follows that some judicial scrutiny of the deprivation is mandated by the Constitution.

Respondents argue that this scrutiny requires invalidation of the Commission rule under traditional equal protection analysis. It is true that our cases establish that the Due Process Clause of the Fifth Amendment authorizes that type of analysis of federal rules and therefore that the Clause has a substantive as well as a procedural aspect. However, it is not necessary to resolve respondents' substantive claim, if a narrower inquiry discloses that essential procedures have not been followed.

When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest. Alternatively, if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.

In this case the petitioners have identified several

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the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." 239 U. S., at 41.

interests which the Congress or the President might deem sufficient to justify the exclusion of noncitizens from the federal service. They argue, for example, that the broad exclusion may facilitate the President's negotiation of treaties with foreign powers by enabling him to offer employment opportunities to citizens of a given foreign country in exchange for reciprocal concessions—an offer he could not make if those aliens were already eligible for federal jobs. Alternatively, the petitioners argue that reserving the federal service for citizens provides an appropriate incentive to aliens to qualify for naturalization and thereby to participate more effectively in our society. They also point out that the citizenship requirement has been imposed in the United States with substantial consistency for over 100 years and accords with international law and the practice of most foreign countries. Finally, they correctly state that the need for undivided loyalty in certain sensitive positions clearly justifies a citizenship requirement in at least some parts of the federal service, and that the broad exclusion serves the valid administrative purpose of avoiding the trouble and expense of classifying those positions which properly belong in executive or sensitive categories.[24]

The difficulty with all of these arguments except the last is that they do not identify any interest which can reasonably be assumed to have influenced the Civil Service Commission, the Postal Service, the General Services Administration, or the Department of Health,

[24] We note, however, that the petitioners do not rely on the District Court's reasoning that the regulation might be justified as serving the economic security of United States citizens. Our discussion of the "special public interest" doctrine in *Sugarman* v. *Dougall*, *supra*, at 643–645, no doubt explains the petitioners' failure to press this argument in this case. We have no occasion, therefore, to decide when, if ever, that doctrine might justify federal legislation.

Education, and Welfare in the administration of their respective responsibilities or, specifically, in the decision to deny employment to the respondents in this litigation. We may assume with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes; but we are not willing to presume that the Chairman of the Civil Service Commission, or any of the other original defendants, was deliberately fostering an interest so far removed from his normal responsibilities. Consequently, before evaluating the sufficiency of the asserted justification for the rule, it is important to know whether we are reviewing a policy decision made by Congress and the President or a question of personnel administration determined by the Civil Service Commission.

III

It is perfectly clear that neither the Congress nor the President has ever *required* the Civil Service Commission to adopt the citizenship requirement as a condition of eligibility for employment in the federal civil service. On the other hand, in view of the fact that the policy has been in effect since the Commission was created in 1883, it is fair to infer that both the Legislature and the Executive have been aware of the policy and have acquiesced in it. In order to decide whether such acquiescence should give the Commission rule the same support as an express statutory or Presidential command, it is appropriate to review the extent to which the policy has been given consideration by Congress or the President, and the nature of the authority specifically delegated to the Commission.

The Commission was originally established pursuant to the Pendleton Civil Service Act of 1883.[25] That Act was a major piece of reform legislation designed to eliminate the abuses associated with the patronage system from much of the federal service.[26] Before that legislation was passed, the Senate considered and rejected a bill that would have expressly limited civil service appointment to citizens.[27] It is fair to summarize the relevant references to the citizenship requirement, however, as indicating that several Senators assumed that such a requirement would be imposed by the Commission,[28] and that the matter was in an area better handled by regulation than by statute.[29]

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[25] 22 Stat. 403.

[26] See *Arnett* v. *Kennedy*, 416 U. S. 134, 149; H. Kaplan, The Law of Civil Service 1–11 (1958).

[27] A companion bill introduced by Senator Dawes (S. 939) would have expressly provided that "appointments are open to competition to any citizen of the United States, male or female. . . . [V]acancies shall be filled by competitive examination open to all citizens, in conformity with the provisions of this act . . . ." Appendix to S. Rep. No. 576, 47th Cong., 1st Sess., 4 (1882).
The Senate Committee also eliminated, apparently as unnecessary, a preamble that referred to the desirability of allowing "so far as practicable all citizens" equal employment opportunities. See S. Rep. No. 576, *supra*, at XII; see also 14 Cong. Rec. 661 (1882).

[28] See, *e. g.*, the remarks of Senator Hawley:
"Of course it will not do to admit to examination everybody that applies for it. There will be requirements—anybody can think of a few in a moment—the applicant must be a citizen of the United States, he must be in fair physical health, he must be within reasonable limits as to age, he certainly must be able to read and write." *Id.*, at 243.

[29] It is noteworthy, however, that other grounds for exclusion from the federal service that would normally be governed by regulation were expressly identified in the statute itself. See § 8 prohibiting the employment of persons habitually using intoxicating beverages to excess, and § 9 prohibiting the employment of members of a family already adequately represented in public service. 22 Stat. 406.

In its historical context, the assumption that only citizens would be employed in the federal service is easily understood. The new system of merit appointment, based on competitive examination, was replacing a patronage system in which appointment had often been treated as a method of rewarding support at the polls; since such rewards were presumably reserved for voters (or members of their families) who would necessarily be citizens, citizenship must have characterized most, if not all, federal employees at that time. The assumption that such a requirement would survive the enactment of the new statute is by no means equivalent to a considered judgment that it should do so.

Moreover, it must be acknowledged that in 1883 there was no doubt a greater inclination than we can now accept to regard "foreigners" as a somewhat less desirable class of persons than American citizens. A provincial attitude toward aliens may partially explain the assumption that they would not be employed in the federal service by the new Civil Service Commission. But since that attitude has been implicitly repudiated by our cases requiring that aliens be treated with the dignity and respect accorded to other persons,[30] and since that attitude did not affect the form of the legislation itself, we disregard it in our evaluation of Congress' participation in the decision to impose the citizenship requirement.

When the Commission was created, it immediately

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[30] Our recent opinion in *In re Griffiths* noted that from "its inception, our Nation welcomed and drew strength from the immigration of aliens." 413 U. S., at 719. After referring to their self-evident contributions to the social and economic life of the country, and after reviewing the objectionable character of any classification based on alienage, we stated: "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." *Id.*, at 722.

adopted the citizenship requirement, and that fact was duly reported to Congress.[31] Congress has not thereafter repudiated, or even considered the desirability of repudiating, the Commission's policy. It has, however, in a number of its Appropriation Acts imposed various limitations on the classes of employees who may receive compensation from the Federal Government. These limitations give rise to conflicting inferences which may be illustrated by reference to five such Acts.

In 1938 Congressman Starnes offered an amendment to the pending appropriation bill [32] to provide that none of the authorized funds could be used to pay the compensation of any federal employee not a citizen of the United States.[33] The stated purpose of the amendment was to give preference to American citizens during a period of widespread unemployment. The amendment was accepted by the House without opposition. In the Senate, however, the restriction was modified to allow employment of any person owing allegiance to the United States, or who was then employed in the service of the United States, or who was needed because citizens with requisite experience and qualifications were not available.[34] In 1939 a similar provision was broadened further to allow compensation for aliens eligible for citizenship who had filed a declaration of intention to become citizens and also for certain Coast Guard veterans who were ineligible for United States citizenship.[35] In 1942 aliens who were

[31] See the Instructions to Applicants Who Wish to Enter the United States Civil Service as reprinted on p. 83 of the Second Report of the U. S. Civil Service Commission (1885).

[32] Independent Offices Appropriation Bill (H. R. 8837, 75th Cong., 3d Sess.).

[33] 83 Cong. Rec. 357.

[34] *Id.*, at 2424.

[35] See House Manager's Report on the Conference on Amendment of the Senate to H. R. 8947, H. R. Conf. Rep. No. 1981, 75th

citizens of the Commonwealth of the Philippines were exempted from the prohibition,[36] in 1943 the exemption was extended to "nationals of those countries allied with the United States in the prosecution of the war," [37] and then in 1953 the exemption was also made applicable to permanently admitted aliens from the Baltic countries.[38]

In the District Court respondents argued that the exemptions from the limitations included in the Appropriations Acts had become so broad by 1969 as to constitute a congressional determination of policy repudiating the narrow citizenship requirement in the Commission rule. Though not controlling, there is force to this argument. On the other hand, the fact that Congress repeatedly identified citizenship as one appropriate classification of persons eligible for compensation for federal service implies a continuing interest in giving preference, for reasons unrelated to the efficiency of the federal service, to citizens over aliens. In our judgment, however, that fact is less significant than the fact that Congress has consistently authorized payment to a much broader class of potential employees than the narrow category of citizens and natives of American Samoa eligible under the Commission rule. Congress has regularly provided for compensation of any federal employee owing allegiance to the United States. Since it is settled that aliens may take an appropriate oath of allegiance,[39] the statutory category, though not precisely defined, is plainly more flexible and expansive than the Commission rule. Nevertheless, for present purposes we need merely conclude

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Cong., 3d Sess. (1938). The provision appeared in several Appropriations Acts. See 52 Stat. 148, 289, 435, 1162.

[36] 56 Stat. 422.

[37] 57 Stat. 196.

[38] 67 Stat. 435.

[39] See *In re Griffiths*, 413 U. S., at 726 n. 18.

that the Appropriations Acts cannot fairly be construed to evidence either congressional approval or disapproval of the specific Commission rule challenged in this case.

Our review of the relevant Executive Orders leads us to a similar conclusion with respect to the President's responsibility for the rule. The first Civil Service rules promulgated by President Arthur required every applicant for an examination to disclose his citizenship, as well as other information such as his name and address.[40] These rules did not expressly prescribe United States citizenship as a condition for eligibility. It may well be true, however, that the President, like the members of the Senate referred to above, assumed that the Commission would impose such a requirement. Moreover, we must assume that he also became aware of the requirement after the Commission adopted it. Nevertheless, there is a marked difference between acceptance by the President of a Commission rule to which no objection has been made and a decision made by the President himself.

Over the years the Commission revised its rules a number of times. Although it was Commission practice to require citizenship between 1883 and 1895, apparently the first time the requirement was expressly stated in a rule was in 1896.[41] In 1903 President Theodore Roosevelt amended the rule to permit persons who "owe allegiance to the United States" to qualify.[42] The amendment did not define that class of persons. The Com-

[40] Rule XI, Civil Service Rules, promulgated Nov. 7, 1883. First Report of the U. S. Civil Service Commission 47 (1884).

[41] Rule V of the Civil Service Rules of May 6, 1896, expressly provided: "Every applicant for examination must be a citizen of the United States . . . ." See Thirteenth Report of the U. S. Civil Service Commission 57 (1897).

[42] See Twentieth Report of the U. S. Civil Service Commission 48 (1904).

mission has explained that it was intended to apply to persons in Puerto Rico and the Philippines who then had the status of noncitizen nationals. The language of the amendment, however, would seem broad enough to cover any person willing to take an appropriate oath of allegiance.[43]

In 1906 President Roosevelt again amended the rule by adding an authorization to the Commission, in its discretion, to permit noncitizens to take examinations when "there is a lack of eligibles who are American citizens." [44] The amendment, however, provided that noncitizens should not be certified if eligible citizens were available. Although this amendment had the effect of increasing the employment opportunities of aliens, it unquestionably indicates that President Roosevelt then approved of a policy of giving preference to citizens.

The Executive Order which authorized the promulgation of the specific rule involved in this case was issued by President Eisenhower in 1954. In relevant part it provides:

> "The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations." Exec. Order No. 10,577, § 2.1 (a), 3 CFR 218, 219 (1954–1958 Comp.).

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[43] It is, of course, clear that one need not be a citizen in order to take in good conscience an oath to support the Constitution. See *In re Griffiths, supra,* at 726 n. 18.

[44] Exec. Order No. 458 (June 13, 1906). Prior to that amendment, Executive Orders had been issued waiving the citizenship requirement in specific cases because of a lack of qualified citizens. See, *e. g.,* Exec. Order No. 434 (Mar. 28, 1906).

This direction "to establish standards with respect to citizenship" is not necessarily a command to require citizenship as a general condition of eligibility for federal employment. Rather it is equally, if not more reasonably, susceptible of interpretation as a command to classify positions for which citizenship should be required. Even though such an interpretation might permit the Commission to decide that citizenship should be required for all federal positions, it would remain true that the decision to impose the requirement was made by the Commission rather than the President. That this is in fact the case is demonstrated by the elimination of the citizenship requirement for employment in the Postal Service which took place after this litigation commenced. Pursuant to a broad grant of authority comparable, in its generality and in its absence of any reference to a citizenship requirement, to that applicable to the Civil Service Commission,[45] the Postal Service orig-

[45] The relevant portions of 39 U. S. C. § 1001 read as follows:

"§ 1001. Appointment and status.

"(a) Except as otherwise provided in this title, the Postal Service shall appoint all officers and employees of the Postal Service.

"(b) Officers and employees of the Postal Service (other than those individuals appointed under sections 202, 204, and 1001 (c) of this title) shall be in the postal career service, which shall be a part of the civil service. Such appointments and promotions shall be in accordance with the procedures established by the Postal Service. The Postal Service shall establish procedures, in accordance with this title, to assure its officers and employees meaningful opportunities for promotion and career development and to assure its officers and employees full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions, with representatives of their own choosing.

. . . . .

"(e) The Postal Service shall have the right, consistent with section 1003 and chapter 12 of this title and applicable laws, regulations, and collective-bargaining agreements—

inally imposed such a requirement and then withdrew it. Neither the establishment nor the withdrawal of the requirement was either mandated or questioned by Congress or the President.

We have no doubt that the statutory directive which merely requires such regulations "as will best promote the efficiency of [the] Service," 5 U. S. C. § 3301 (1), as well as the pertinent Executive Order, gives the Civil Service Commission the same discretion that the Postal Service has actually exercised; the Commission may either retain or modify the citizenship requirement without further authorization from Congress or the President.[46] We are therefore persuaded that our inquiry is whether the national interests which the Government identifies as justifications for the Commission rule are

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"(1) to direct officers and employees of the Postal Service in the performance of official duties;

"(2) to hire, promote, transfer, assign, and retain officers and employees in positions within the Postal Service, and to suspend, demote, discharge, or take other disciplinary action against such officers and employees;

"(3) to relieve officers and employees from duties because of lack of work or for other legitimate reasons;

"(4) to maintain the efficiency of the operations entrusted to it;

"(5) to determine the methods, means, and personnel by which such operations are to be conducted;

"(6) to prescribe a uniform dress to be worn by letter carriers and other designated employees; and

"(7) to take whatever actions may be necessary to carry out its mission in emergency situations."

[46] Even if this conclusion were doubtful, in view of the consequences of the rule it would be appropriate to require a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule. Cf. *Peters* v. *Hobby*, 349 U. S. 331, 345; *Ex parte Endo*, 323 U. S. 283, 299–300.

interests on which that agency may properly rely in making a decision implicating the constitutional and social values at stake in this litigation.

We think the petitioners accurately stated the question presented in their certiorari petition. The question is whether the regulation of the United States Civil Service Commission is valid. We proceed to a consideration of that question, assuming, without deciding, that the Congress and the President have the constitutional power to impose the requirement that the Commission has adopted.

IV

It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market. On the contrary, the Commission performs a limited and specific function.

The only concern of the Civil Service Commission is the promotion of an efficient federal service.[47] In general

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[47] The Commission, of course, acts under the direction of the President.

Title 5 U. S. C. § 3301 (1) provides:

"The President may—

"(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

Title 5 U. S. C. § 1302 (a) provides:

"(a) The Civil Service Commission, subject to the rules prescribed by the President under this title for the administration of the com-

it is fair to assume that its goal would be best served by removing unnecessary restrictions on the eligibility of qualified applicants for employment. With only one exception, the interests which the petitioners have put forth as supporting the Commission regulation at issue in this case are not matters which are properly the business of the Commission. That one exception is the administrative desirability of having one simple rule excluding all noncitizens when it is manifest that citizenship is an appropriate and legitimate requirement for some important and sensitive positions. Arguably, therefore, administrative convenience may provide a rational basis for the general rule.

For several reasons that justification is unacceptable in this case. The Civil Service Commission, like other administrative agencies, has an obligation to perform its responsibilities with some degree of expertise, and to make known the reasons for its important decisions. There is nothing in the record before us, or in matter of which we may properly take judicial notice, to indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other. Nor can we reasonably infer that the administrative burden of establishing the job classifications for which citizenship is an appropriate requirement would be a particularly onerous task for an expert in personnel matters; indeed, the Postal Service apparently encountered no particular difficulty in making such a classification. Of greater significance, however, is the quality of the interest at stake. Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate

petitive service, shall prescribe regulations for, control, supervise, and preserve the records of, examinations for the competitive service."

209-904 O - 78 - 11

policy, as opposed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience in this case.[48]

In sum, assuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission. The impact of the rule on the millions of lawfully admitted resident aliens is precisely the same as the aggregate impact of comparable state rules which were invalidated by our decision in *Sugarman*. By broadly denying this class substantial opportunities for employment, the Civil Service Commission rule deprives its members of an aspect of liberty. Since these residents were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States,[49] due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency. We hold that § 338.101 (a) of the Civil Service Commission Regulations has deprived these re-

[48] We find no merit in the petitioners' argument that a more discriminating rule would inevitably breed litigation which in turn would enhance the administrative burden. For even though the argument of administrative convenience may not support a total exclusion, it would adequately support a rather broad classification of positions reflecting the considered judgment of an agency expert in personnel matters. For the classification itself would demonstrate that the Commission had at least considered the extent to which the imposition of the rule is consistent with its assigned mission.

[49] See 8 U. S. C. § 1103.

spondents of liberty without due process of law and is therefore invalid.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion with the understanding that there are reserved the equal protection questions that would be raised by congressional or Presidential enactment of a bar on employment of aliens by the Federal Government.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join, dissenting.

The Court's opinion enunciates a novel conception of the procedural due process guaranteed by the Fifth Amendment, and from this concept proceeds to evolve a doctrine of delegation of legislative authority which seems to me to be quite contrary to the doctrine established by a long and not hitherto questioned line of our decisions. Neither of the Court's innovations is completely without appeal in this particular case, but even if we were to treat the matter as an original question I think such appeal is outweighed by the potential mischief which the doctrine bids fair to make in other areas of the law.

I

At the outset it is important to recognize that the power of the federal courts is severely limited in the areas of immigration and regulation of aliens. As we reiterated recently in *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972):

" 'The power of Congress to exclude aliens alto-

gether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.'" Quoting from *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547 (1895).

It is also clear that the exclusive power of Congress to prescribe the terms and conditions of entry includes the power to regulate aliens in various ways once they are here. *E. g., Hines* v. *Davidowitz*, 312 U. S. 52, 69–70 (1941). Indeed the Court, by holding that the regulation in question would presumptively have been valid if "expressly mandated by the Congress," *ante*, at 103, concedes the congressional power to exclude aliens from employment in the civil service altogether if it so desires or to limit their participation.

This broad congressional power is in some respects subject to procedural limitations imposed by the Due Process Clause of the Fifth Amendment. If an alien subject to deportation proceedings claims to be a citizen, he is entitled to a judicial determination of that claim. *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922). If he lawfully obtains tenured Government employment, and is thereby protected against discharge except for cause, he is entitled to a hearing before being discharged. *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Perry* v. *Sindermann*, 408 U. S. 593 (1972). But neither an alien nor a citizen has any protected liberty interests in obtaining federal employment. *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896–899 (1961). Nor in the absence of some form of statutory tenure is a Government employee entitled to a hearing prior to discharge, for "government employment, in the absence of legislation, can be revoked at the will of the appointing officer."

Id., at 896. See also *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959).

The Court, however, seems to overlook this limitation on judicial power in justifying judicial intervention by holding:

> "The rule enforced by the Commission has its impact on an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community." *Ante*, at 102.

This is a classic equal protection analysis such as formed the basis of the Court's holding in *Sugarman* v. *Dougall*, 413 U. S. 634, 641 (1973), that States could not bar aliens from the *state* civil service. *Sugarman* specifically did not decide whether similar restrictions by the Federal Government would violate equal protection principles (as applied to the Federal Government by the Due Process Clause of the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U. S. 497 (1954)).

However, while positing an equal protection problem, the Court does not rely on an equal protection analysis, conceding that "overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State." *Ante*, at 101. Thus the Court seems to agree that the Equal Protection Clause does not provide a basis for invalidating this denial of *federal* civil service employment. The Court instead inexplicably melds together the concepts of equal protection and procedural and substantive due process to produce the following holding:

> "The added disadvantage resulting from the enforcement of the rule—ineligibility for employment in a major sector of the economy—is of sufficient significance to be characterized as a deprivation of

> an interest in liberty. Indeed, we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process." *Ante,* at 102–103 (footnote omitted).

The meaning of this statement in the Court's opinion is not immediately apparent. As already noted, there is no general "liberty" interest in either acquiring federal employment or, in the absence of a statutory tenure, in retaining it, so that the person who is denied employment or who is discharged may insist upon a due process hearing. *Truax* v. *Raich,* 239 U. S. 33, 41 (1915), is cited by the Court to support the proposition that there is a "liberty" interest at stake here. But to the extent that the holding of that case remains unmodified by *Cafeteria Workers, supra,* it deals with a *substantive* liberty interest which may not be arbitrarily denied by legislative enactment; that interest is closely akin to the interest of the aliens asserted in *Sugarman, supra,* and *In re Griffiths,* 413 U. S. 717 (1973). Since the Court declines to pass upon the claim asserted by respondents based upon those cases, it is difficult to see how *Truax* is relevant to its analysis.

There is a liberty interest in obtaining public employment which is protected against procedural deprivation in certain circumstances, as the Court's citation to *Board of Regents* v. *Roth,* 408 U. S. 564, 573–574 (1972), *ante,* at 102 n. 23, indicates. But the cases cited in that passage from *Roth,* cases such as *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957), and *Willner* v. *Committee on Character,* 373 U. S. 96 (1963), are distinguishable from the present case in at least two respects. In the first place they were both efforts by States, not to deny *public* employment, but to go further

and proscribe the right to practice one's chosen profession in the *private* sector of the economy. Even more importantly, the vice found in each of those cases was the failure of the State to grant a "full prior hearing," 408 U. S., at 574.

But in the case presently before the Court, there is simply no issue which would require a hearing in order to establish any matter of disputed fact. All of the respondents freely concede that they are aliens. Their claim is not that they were entitled to a hearing in order to establish the fact that they were citizens, or to establish some other relevant fact; indeed they request no hearing for any purpose. Petitioners assert that due to respondents' alienage they are barred from federal employment, and respondents simply contend that they may not be.

Yet the Court does not decide this issue, but proceeds instead to hold that procedural due process includes not only a shield against arbitrary action but a scalpel with which one may dissect the administrative organization of the Federal Government.

> "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Ante,* at 103.

But the "overriding national interest" asserted by the petitioners is not a specific interest in excluding these particular aliens from the civil service, but a general interest in formulating policies toward aliens. See *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952). As such it is not necessary for the petitioners to demonstrate why they chose to exclude aliens from the civil service.

To require them to do so is to subject the Government to the same type of equal protection analysis to which the States are subject under *Sugarman* v. *Dougall, supra,* a result which the Court specifically abjures. *Ante,* at 100–101. What the Court seems to do is to engraft notions of due process onto the case law from this Court dealing with the delegation by Congress of its legislative authority to administrative agencies.

In two cases decided in the October Term 1934 the Court held that Congress "is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested" by Art. I, § 1, of the Constitution. *Schechter Corp.* v. *United States,* 295 U. S. 495, 529 (1935). *Panama Rfg. Co.* v. *Ryan,* 293 U. S. 388 (1935). Nothing in either of those opinions, the only cases in which delegations to administrative agencies have been struck down, suggested any reliance upon the Due Process Clause of the Fifth Amendment, and it seems a fair statement to say that the Court has not seen fit during the 40 years following these decisions to enlarge in the slightest their relatively narrow holdings.

Not only is such reliance unjustified by prior decisions of this Court as to the scope of the due process guarantee, but it flies in the face of those cases which hold that the manner in which policies concerning aliens are made within the political branches of the government is not subject to judicial scrutiny. *Kleindienst* v. *Mandel,* 408 U. S. 753 (1972); *Galvan* v. *Press,* 347 U. S. 522, 531 (1954).[1]

[1] In *Galvan* the Court held that congressional policies "pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." 347 U. S., at 531. As such, the only judicial review of those policies is to insure that the Government has respected the demands of procedural due process not whether the policies themselves are constitutionally valid.

II

The sole ground by which such procedures may properly be challenged is to argue that there was an improper delegation of authority, which has not previously been thought to depend upon the procedural requirements of the Due Process Clause.

The Court, while not shaping its argument in these terms seems to hold that the delegation here was faulty. Yet, it seems to me too clear to admit of argument that under the traditional standards governing the delegation of authority the Civil Service Commission was fully empowered to act in the manner in which it did in this case.

Congress, in the Civil Service Act, 5 U. S. C. § 3301, delegated to the President the power to

> "(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service; [and]
>
> "(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought . . . ." [2]

The President, acting under this grant of authority as well as the "authority vested in [him] by the Constitution," promulgated Executive Order No. 10,577, 3 CFR 218 (1954–1958 Comp.), in which he authorized the Civil Service Commission

> "to establish standards with respect to citizenship, age, education . . . and for residence or other requirements which applicants must meet to be admitted to or rated in examinations." *Id.*, § 2.1 (a), p. 219.

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[2] Also, 5 U. S. C. § 1302 directly authorized the Civil Service Commission, subject to rules prescribed by the President, to "prescribe regulations for . . . examinations for the competitive service."

Acting pursuant to this authority the Civil Service Commission then promulgated the regulations in question which exclude aliens from examination for or appointment to (except under certain special circumstances) the civil service.

Both Congress and the President thus took a power which they possessed and, instead of exercising it directly, chose to delegate it. This is the process by which all federal regulations are promulgated and to forbid it would be to necessarily dismantle the entire structure of the Executive Branch. But the majority does not challenge the procedure as to all cases. Rather, the challenge seems to be leveled only at policies which "rais[e] . . . constitutional questions." *Ante,* at 113 n. 46. In those cases it becomes necessary for the agency, which was concededly acting within the scope of its delegated power, to provide reasons which will justify its actions in the eyes of the courts.

But, as previously discussed, such a holding overlooks the basic principle that a decision to exclude aliens from the civil service is a political decision reserved to Congress, the wisdom of which may not be challenged in the courts. Once it is determined that the agency in question was properly delegated the power by Congress to make decisions regarding citizenship of prospective civil servants, then the reasons for which that power was exercised are as foreclosed from judicial scrutiny as if Congress had made the decision itself. The fact that Congress has delegated a power does not provide a back door through which to attack a policy which would otherwise have been immune from attack.[3]

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[3] In *Ludecke* v. *Watkins,* 335 U. S. 160 (1948), the Court approved a delegation of authority from Congress through the President to the Attorney General to deport any "alien enemies" whom the Attorney General deemed to be "dangerous to the public peace and

For this Court to hold, *ante,* at 114, that the agency chosen by Congress, through the President, to effectuate its policies, has "no responsibility" in that area is to interfere in an area in which the Court itself clearly has "no responsibility": the organization of the Executive Branch. Congress, through the President, obviously *gave* responsibility in this area to the Civil Service Commission. The wisdom of that delegation is not for us to evaluate. Finally I note that, though there is no requirement that it do so, it would appear that, contrary to the Court's assertion, Congress has in fact spoken directly to this issue. In § 502 of the Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act, 1970, 83 Stat. 336 (discussed by the Court, *ante,* at 93–94), Congress provided that no compensation will be paid to any employee of the Government who is not (1) a citizen, (2) "a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen" or (3) a person who "owes allegiance to the United States."

Since respondents are not citizens the question arises as to which of the other categories they fit into. The effective date of the Act was December 11, 1969. Yet according to the record, none of the respondents was employed until August 1970 and one, Lum, was never employed by the Government.

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safety of the United States." Presidential Proclamation No. 2655, 59 Stat. 870 (1945). The Court held that the "Attorney General was the President's voice and conscience. A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized." 335 U. S., at 165–166.

At the time of their discharge none of the respondents had declared their loyalty to the United States. While it is not clear what it means to "owe allegiance," it must mean something, and there has been no assertion by respondents that they qualified. Indeed, in June 1971, after the litigation was begun, Mow Sun Wong and Sin Hung Mok filed affidavits with the District Court asserting: "I owe allegiance to the United States." This would seem to imply that, at the time of their discharge, they did not qualify under the statute.

III

Since I do not believe that the Court is correct in concluding that the regulation promulgated by the Civil Service Commission is invalid because of any lack of authority in the Commission to promulgate the rule, I must address the question of whether "the national interests" identified by the petitioners would adequately support a "determination . . . to exclude all noncitizens from the federal service." *Ante,* at 116. This question was saved in both *Sugarman* v. *Dougall,* 413 U. S. 634 (1973), and in *In re Griffiths,* 413 U. S. 717 (1973), and I agree with the Court that "the paramount federal power over immigration and naturalization forecloses a simple extension of the holding in *Sugarman* as decisive of this case." *Ante,* at 100.

> "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews* v. *Diaz, ante,* at 81.
>
> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of gov-

> ernment. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy,* 342 U. S., at 588–589, quoted in *Mathews* v. *Diaz, ante,* at 81 n. 17.

See also *Kleindienst* v. *Mandel,* 408 U. S., at 765–767; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711–713 (1893).

I conclude therefore that Congress, in the exercise of its political judgment, could have excluded aliens from the civil service. The fact that it chose, in a separate political decision, to allow the Civil Service Commission to make this determination does not render the governmental policy any less "political" and, consequently, does not render it any more subject to judicial scrutiny under the reasoning of *Diaz, ante,* p. 67. The regulations here, enforced without question for nearly a century, do not infringe upon any constitutional right of these respondents. I would therefore reverse the judgment of the Court of Appeals.

CAPPAERT ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–1107. Argued January 12, 1976—Decided June 7, 1976*

Devil's Hole, a deep cavern on federal land in Nevada containing an underground pool inhabited by a unique species of desert fish, was reserved as a national monument by a 1952 Presidential Proclamation issued under the American Antiquities Preservation Act, which authorizes the President to proclaim as national monuments, *inter alia*, "objects of historic or scientific interest" situated on federal land. In 1968 the Cappaerts, petitioners in No. 74–1107, who own a nearby ranch, began pumping groundwater coming from the same source as the water in Devil's Hole, thereby reducing the water level in Devil's Hole and endangering its fish. Subsequently, the Cappaerts applied to the Nevada State Engineer for permits to change the use of water from several of their wells. Although the United States was not made a party to that proceeding, the National Park Service filed a protest, seeking either a denial of the application or a postponement of a decision until it could be determined whether the pumping of the Cappaerts' wells should be limited to prevent lowering of the water in Devil's Hole. The State Engineer overruled the protest and granted the permits. The United States then filed suit in the District Court seeking to limit the Cappaerts' pumping of their wells. The District Court permanently enjoined pumping that would lower the water below a certain level necessary to preserve the fish, holding that in establishing Devil's Hole as a national monument, the President reserved appurtenant, unappropriated waters necessary to the purpose of the reservation, including preservation of the pool and its fish, that the federal water rights antedated those of the Cappaerts, and that the United States was not estopped from injunctive relief against the use of water under land exchanged with the Cappaerts. The Court of Appeals affirmed. *Held:* As of 1952 when the United States reserved Devil's Hole, it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the underground pool to preserve its scien-

*Together with No. 74–1304, *Nevada ex rel. Westergard* v. *United States et al.*, also on certiorari to the same court.

tific value and thereby implement the Presidential Proclamation. Pp. 138–147.

(a) When the Federal Government reserves land from the public domain, by implication it reserves water rights sufficient to accomplish the purposes of the reservation, and here the 1952 Proclamation expressed an intention to reserve unappropriated water. Pp. 138–141.

(b) The purpose of reserving Devil's Hole being the preservation of the underground pool, the District Court appropriately tailored its injunction to the minimal need, curtailing pumping only to the extent necessary to preserve a water level adequate to protect the pool's scientific value as the natural habitat of the fish species sought to be preserved. P. 141.

(c) The American Antiquities Preservation Act authorized the President to reserve the pool in Devil's Hole, since such pool and its rare inhabitants are "objects of historic or scientific interest" within the meaning of that Act. Pp. 141–142.

(d) Since the implied-reservation-of-water doctrine is based on the necessity of water for the purpose of the federal reservation, the United States can protect its water from subsequent diversion, whether the diversion is of surface water or groundwater. Pp. 142–143.

(e) Since the Desert Land Act of 1877, which provides that patentees of public land acquire only title to land through the patent and must acquire water rights in nonnavigable water in accordance with state law, does not apply to water rights of federal reserved land, *FPC* v. *Oregon*, 349 U. S. 435, determination of such reserved water rights is not governed by state law but derives from the federal purpose of the reservation, and thus the fact that the water rights here reserved apply to nonnavigable rather than navigable water is irrelevant. Pp. 143–146.

(f) That the National Park Service filed a protest to the Cappaerts' pumping permit application in the state administrative proceeding, did not bar the United States, by res judicata or collateral estoppel, from litigating its water-rights claim in federal court. The United States was not made a party to the state proceeding, was not in privity with the Cappaerts, and did not assert any federal water-rights claims in such proceeding; and thus the issue raised in the District Court was not decided in the state proceedings. Pp. 146–147.

508 F. 2d 313, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Samuel S. Lionel argued the cause and filed briefs for petitioners in No. 74–1107. *George Allison*, Special Deputy Attorney General of Nevada, argued the cause for petitioner in No. 74–1304. With him on the briefs was *Peter D. Laxalt*, Special Deputy Attorney General.

Deputy Solicitor General Randolph argued the cause for the United States in both cases. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Kiechel, Harry R. Sachse, Jacques B. Gelin, John H. Germeraad*, and *Robert L. Klarquist*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed (1) for the States of Colorado, North Dakota, and Washington by *J. D. MacFarlane*, Attorney General of Colorado, *Jean E. Dubofsky*, Deputy Attorney General, *Edward G. Donovan*, Solicitor General, *David W. Robbins*, First Assistant Attorney General, *Charles M. Elliott*, Special Assistant Attorney General, *Allen I. Olson*, Attorney General of North Dakota, *Gerald W. Vandewalle*, Chief Deputy Attorney General, *Slade Gorton*, Attorney General of Washington, and *Charles B. Roe*, Senior Assistant Attorney General; and (2) for the States of Arizona, Hawaii, Idaho, Kansas, Montana, Nebraska, New Mexico, Oklahoma, South Dakota, Utah, and Wyoming by *Bruce Babbitt*, Attorney General of Arizona, *Ronald Y. Amemiya*, Attorney General of Hawaii, *Wayne L. Kidwell*, Attorney General of Idaho, *Curt T. Schneider*, Attorney General of Kansas, *Robert L. Woodahl*, Attorney General of Montana, *Paul L. Douglas*, Attorney General of Nebraska, *Antonio Anaya*, Attorney General of New Mexico, *Larry Derryberry*, Attorney General of Oklahoma, *William J. Janklow*, Attorney General of South Dakota, *Vernon B. Romney*, Attorney General of Utah, and *V. Frank Mendicino*, Attorney General of Wyoming.

Bruce R. Green and *Robert S. Pelcyger* filed a brief for the Salt River Pima-Maricopa Indian Community et al. as *amici curiae* urging affirmance in No. 74–1304.

Evelle J. Younger, Attorney General, *Carl Boronkay*, Assistant Attorney General, and *Roderick Walston*, *Richard C. Jacobs*, and *Douglas B. Noble*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* in No. 74–1304.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this litigation is whether the reservation of Devil's Hole as a national monument reserved federal water rights in unappropriated water.

Devil's Hole is a deep limestone cavern in Nevada. Approximately 50 feet below the opening of the cavern is a pool 65 feet long, 10 feet wide, and at least 200 feet deep, although its actual depth is unknown. The pool is a remnant of the prehistoric Death Valley Lake System and is situated on land owned by the United States since the Treaty of Guadalupe Hidalgo in 1848, 9 Stat. 922. By the Proclamation of January 17, 1952, President Truman withdrew from the public domain a 40-acre tract of land surrounding Devil's Hole, making it a detached component of the Death Valley National Monument. Proclamation No. 2961, 3 CFR 147 (1949–1953 Comp.).[1] The Proclamation was issued under the American Antiquities Preservation Act, 34 Stat. 225, 16 U. S. C. § 431, which authorizes the President to declare as national monuments "objects of historic or scientific inter-

[1] The final paragraphs of the Proclamation withdrawing Devil's Hole from the public domain recite:

"Now, Therefore, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906, 34 Stat. 225 (16 U. S. C. 431), do proclaim that, subject to the provisions of the act of Congress approved June 13, 1933, 48 Stat. 139 (16 U. S. C. 447), and to all valid existing rights, the following-described tract of land in Nevada is hereby added to and reserved as a part of the Death Valley National Monument, as a detached unit thereof:

"Mount Diablo Meridian, Nevada T. 17 S., R. 50 E., sec. 36, SW ¼ SE ¼.

"Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this addition to the said monument and not to locate or settle on any of the lands thereof."

209-904 O - 78 - 12

est that are situated upon the lands owned or controlled by the Government of the United States . . . ."

The 1952 Proclamation notes that Death Valley was set aside as a national monument "for the preservation of the unusual features of scenic, scientific, and educational interest therein contained." The Proclamation also notes that Devil's Hole is near Death Valley and contains a "remarkable underground pool." Additional preambulary statements in the Proclamation explain why Devil's Hole was being added to the Death Valley National Monument:

> "Whereas the said pool is a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System, and is unusual among caverns in that it is a solution area in distinctly striated limestone, while also owing its formation in part to fault action; and
>
> "Whereas the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region; and
>
> "Whereas the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of the said monument . . . ."

The Proclamation provides that Devil's Hole should be supervised, managed, and directed by the National

Park Service, Department of the Interior. Devil's Hole is fenced off, and only limited access is allowed by the Park Service.

The Cappaert petitioners own a 12,000-acre ranch near Devil's Hole, 4,000 acres of which are used for growing Bermuda grass, alfalfa, wheat, and barley; 1,700 to 1,800 head of cattle are grazed. The ranch represents an investment of more than $7 million; it employs more than 80 people with an annual payroll of more than $340,000.

In 1968 the Cappaerts began pumping groundwater on their ranch on land 2½ miles from Devil's Hole; they were the first to appropriate groundwater. The groundwater comes from an underground basin or aquifer which is also the source of the water in Devil's Hole. After the Cappaerts began pumping from the wells near Devil's Hole, which they do from March to October, the summer water level of the pool in Devil's Hole began to decrease. Since 1962 the level of water in Devil's Hole has been measured with reference to a copper washer installed on one of the walls of the hole by the United States Geological Survey. Until 1968, the water level, with seasonable variations, had been stable at 1.2 feet below the copper marker. In 1969 the water level in Devil's Hole was 2.3 feet below the copper washer; in 1970, 3.17 feet; in 1971, 3.48 feet; and, in 1972, 3.93 feet.

When the water is at the lowest levels, a large portion of a rock shelf in Devil's Hole is above water. However, when the water level is at 3.0 feet below the marker or higher, most of the rock shelf is below water, enabling algae to grow on it. This in turn enables the desert fish (*cyprinodon diabolis,* commonly known as Devil's Hole pupfish), referred to in President Truman's Proclamation, to spawn in the spring. As the rock shelf be-

comes exposed, the spawning area is decreased, reducing the ability of the fish to spawn in sufficient quantities to prevent extinction.

In April 1970 the Cappaerts, pursuant to Nevada law, Nev. Rev. Stat. § 533.325 (1973), applied to the State Engineer, Roland D. Westergard, for permits to change the use of water from several of their wells. Although the United States was not a party to that proceeding and was never served, employees of the National Park Service learned of the Cappaerts' application through a public notice published pursuant to Nevada law. § 533.360. An official of the National Park Service filed a protest as did a private firm. Nevada law permits interested persons to protest an application for a permit; the protest may be considered by the State Engineer at a hearing. § 533.365. A hearing was conducted on December 16, 1970, and a field solicitor of the Department of the Interior appeared on behalf of the National Park Service. He presented documentary and testimonial evidence, informing the State Engineer that because of the declining water level of Devil's Hole the United States had commissioned a study to determine whether the wells on the Cappaerts' land were hydrologically connected to Devil's Hole and, if so, which of those wells could be pumped safely and which should be limited to prevent lowering of the water level in Devil's Hole. The Park Service field solicitor requested either that the Cappaerts' application be denied or that decision on the application be postponed until the studies were completed.

The State Engineer declined to postpone decision. At the conclusion of the hearing he stated that there was no recorded federal water right with respect to Devil's Hole, that the testimony indicated that the Cappaerts' pumping would not unreasonably lower the water table or adversely affect existing water rights, and that the

permit would be granted since further economic development of the Cappaerts' land would be in the public interest. In his oral ruling the State Engineer stated in part that "the protest to the applications that are the subject of this hearing are overruled and the applications will be issued subject to existing rights." The National Park Service did not appeal. See Nev. Rev. Stat. § 533.450 (1973).

In August 1971 the United States, invoking 28 U. S. C. § 1345,[2] sought an injunction in the United States District Court for the District of Nevada to limit, except for domestic purposes, the Cappaerts' pumping from six specific wells and from specific locations near Devil's Hole. The complaint alleged that the United States, in establishing Devil's Hole as part of Death Valley National Monument, reserved the unappropriated waters appurtenant to the land to the extent necessary for the requirements and purposes of the reservation. The complaint further alleged that the Cappaerts had no perfected water rights as of the date of the reservation. The United States asserted that pumping from certain of the Cappaerts' wells had lowered the water level in Devil's Hole, that the lower water level was threatening the survival of a unique species of fish, and that irreparable harm would follow if the pumping were not enjoined. On June 2, 1972, the United States filed an amended complaint, adding two other specified wells to the list of those to be enjoined.

The Cappaerts answered, admitting that their wells draw water from the same underlying sources supply-

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[2] Title 28 U. S. C. § 1345 provides as follows:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

ing Devil's Hole, but denying that the reservation of Devil's Hole reserved any water rights for the United States. The Cappaerts alleged that the United States was estopped from enjoining use of water under land which it had exchanged with the Cappaerts. The State of Nevada intervened on behalf of the State Engineer as a party defendant but raised no affirmative defenses.

On June 5, 1973, the District Court, by Chief Judge Roger D. Foley, entered a preliminary injunction limiting pumping from designated wells so as to return the level of Devil's Hole to not more than 3.0 feet below the marker. Detailed findings of fact were made and the District Judge then appointed a Special Master to establish specific pumping limits for the wells and to monitor the level of the water at Devil's Hole. The District Court found that the water from certain of the wells was hydrologically connected to Devil's Hole, that the Cappaerts were pumping heavily from those wells, and that that pumping had lowered the water level in Devil's Hole. The court also found that the pumping could be regulated to stabilize the water level at Devil's Hole and that neither establishing an artificial shelf nor transplanting the fish was a feasible alternative that would preserve the species. The District Court further found that if the injunction did not issue "there is grave danger that the Devil's Hole pupfish may be destroyed, resulting in irreparable injury to the United States." 375 F. Supp. 456, 460 (1974).

The District Court then held that in establishing Devil's Hole as a national monument, the President reserved appurtenant, unappropriated waters necessary to the purpose of the reservation; the purpose included preservation of the pool and the pupfish in it. The District Court also held that the federal water rights antedated those of the Cappaerts, that the United States

was not estopped, and that the public interest required granting the injunction. On April 9, 1974, the District Court entered its findings of fact and conclusions of law substantially unchanged in a final decree permanently enjoining pumping that lowers the level of the water below the 3.0-foot level. 375 F. Supp. 456 (1974).

The Court of Appeals for the Ninth Circuit affirmed, 508 F. 2d 313 (1974),[3] in a thorough opinion by Senior District Judge Gus J. Solomon, sitting by designation, holding that the implied-reservation-of-water doctrine applied to groundwater as well as to surface water. The Court of Appeals held that "[t]he fundamental purpose of the reservation of the Devil's Hole pool was to assure that the pool would not suffer changes from its condition at the time the Proclamation was issued in 1952 . . . ." *Id.*, at 318. The Court of Appeals further held that neither the Cappaerts nor their successors in interest had any water rights in 1952, nor was the United States estopped from asserting its water rights by exchanging land with the Cappaerts. In answer to contentions raised by the intervenor Nevada, the Court of Appeals held that "the United States is not bound by state water laws when it reserves land from the public domain," *id.*, at 320, and does not need to take steps to perfect its rights with the State; that the District Court had concurrent jurisdiction with the state courts to resolve this claim; and, that the state administrative procedures granting the Cappaerts' permit did not bar resolution of the United States' suit in Federal District Court.

[3] On appeal from the preliminary injunction, the Court of Appeals, in response to a motion from the Cappaerts to modify the injunction to permit them to pump to 3.7 feet below the copper marker, had permitted the Cappaerts to pump so long as the water level did not drop more than 3.3 feet below the marker. 483 F. 2d 432 (1973).

We granted certiorari to consider the scope of the implied-reservation-of-water-rights doctrine. 422 U. S. 1041 (1975). We affirm.

I

Reserved-Water-Rights Doctrine

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. *Colorado River Water Cons. Dist.* v. *United States*, 424 U. S. 800, 805 (1976); *United States* v. *District Court for Eagle County*, 401 U. S. 520, 522–523 (1971); *Arizona* v. *California*, 373 U. S. 546, 601 (1963); *FPC* v. *Oregon*, 349 U. S. 435 (1955); *United States* v. *Powers*, 305 U. S. 527 (1939); *Winters* v. *United States*, 207 U. S. 564 (1908).

Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in *Winters* v. *United States*, *supra*, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring

their diversions of the water. The "Statement of the Case" in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.[4]

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. See, *e. g., Arizona* v. *California, supra,* at 599–601; *Winters* v. *United States, supra,* at 576. Both the District Court and the Court of Appeals held that the 1952 Proclamation expressed an intention to reserve unappropriated water, and we agree.[5] The

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[4] Nevada is asking, in effect, that the Court overrule *Arizona* v. *California,* 373 U. S. 546 (1963), and *United States* v. *District Court for Eagle County,* 401 U. S. 520 (1971), to the extent that they hold that the implied-reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." Brief for Nevada 15. However, since balancing the equities is not the test, those cases need not be disturbed.

[5] The District Court and the Court of Appeals correctly held that neither the Cappaerts nor their predecessors in interest had acquired any water rights as of 1952 when the United States' water rights vested. Part of the land now comprising the Cappaerts' ranch was patented by the United States to the Cappaerts' predecessors as early as 1890. None of the patents conveyed water rights because the Desert Land Act of 1877, 19 Stat. 377, 43 U. S. C. § 321, provided that such patents pass title only to land, not water. Patentees acquire water rights by "bona fide prior appropriation," as determined by state law. *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142 (1935). Under Nevada law water

Proclamation discussed the pool in Devil's Hole in four of the five preambles and recited that the "pool . . . should be given special protection." Since a pool is a body of water, the protection contemplated is meaningful only if the water remains; the water right reserved by the 1952 Proclamation was thus explicit, not implied.[6]

Also explicit in the 1952 Proclamation is the authority of the Director of the Park Service to manage the lands of Devil's Hole Monument "as provided in the act of Congress entitled 'An Act to establish a National Park Service, and for other purposes,' approved August 25, 1916 (39 Stat. 535; 16 U. S. C. 1–3) . . . ." The National Park Service Act provides that the "fundamental purpose of the said parks, monuments, and reservations" is

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rights can be created only by appropriation for beneficial use. Nev. Rev. Stat. §§ 533.030, 534.020, 533.325 (1973). *Jones* v. *Adams*, 19 Nev. 78, 6 P. 442 (1885). Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to its continued use as long as the water is beneficially diverted. See *Colorado River Water Cons. Dist.* v. *United States*, 424 U. S. 800, 805 (1976). See also J. Sax, Water Law, Planning & Policy—Cases and Materials, 218–224 (1968). Neither the Cappaerts nor their predecessors in interest appropriated any water until after 1952.

Some Cappaert wells are on land acquired from the United States in 1969 through a land exchange under § 8 of the Taylor Grazing Act of 1934, 48 Stat. 1272, as amended, 43 U. S. C. § 315g (b). In this exchange the Cappaerts received land within one mile of Devil's Hole under a patent granting them "all rights, privileges, immunities and appurtenances . . . *subject to any vested and accrued water rights for mining, agriculture, manufacturing or other purposes. . . .*" (Emphasis supplied.) The federal water rights in Devil's Hole had vested 17 years before that exchange.

[6] The 1952 Proclamation forbids unauthorized persons to "appropriate, injure, destroy, or remove any feature" from the reservation. Since water is a "feature" of the reservation, the Cappaerts, by their pumping, are "appropriating" or "removing" this feature in violation of the Proclamation.

"to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 39 Stat. 535, 16 U. S. C. § 1.

The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. *Arizona* v. *California, supra,* at 600–601. Here the purpose of reserving Devil's Hole Monument is preservation of the pool. Devil's Hole was reserved "for the preservation of the unusual features of scenic, scientific, and educational interest." The Proclamation notes that the pool contains "a peculiar race of desert fish . . . which is found nowhere else in the world" and that the "pool is of . . . outstanding scientific importance . . . ." The pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest. The fish are one of the features of scientific interest. The preamble noting the scientific interest of the pool follows the preamble describing the fish as unique; the Proclamation must be read in its entirety. Thus, as the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation.

Petitioners in both cases argue that even if the intent of the 1952 Proclamation were to maintain the pool, the American Antiquities Preservation Act did not give the President authority to reserve a pool. Under that Act, according to the Cappaert petitioners, the President may

reserve federal lands only to protect archeologic sites. However, the language of the Act which authorizes the President to proclaim as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government" is not so limited. The pool in Devil's Hole and its rare inhabitants are "objects of historic or scientific interest." See generally *Cameron* v. *United States*, 252 U. S. 450, 451–456 (1920).

II

Groundwater

No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater. Nevada argues that the implied-reservation doctrine is limited to surface water. Here, however, the water in the pool is surface water. The federal water rights were being depleted because, as the evidence showed, the "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." C. Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, p. xxiv (1971). Here the Cappaerts are causing the water level in Devil's Hole to drop by their heavy pumping. See Corker, *supra;* see also Water Policies for the Future—Final Report to the President and to the Congress of the United States by the National Water Commission 233 (1973). It appears that Nevada itself may recognize the potential interrelationship between surface and ground water since Nevada applies the law of prior appropriation to both. Nev. Rev. Stat. §§ 533.010 *et seq.*, 534.020, 534.080, 534.090 (1973). See generally F. Trelease, Water Law—Resource Use and Environmental Protection 457–552 (2d ed. 1974); C. Meyers & A. Tar-

lock, Water Resource Management 553–634 (1971). Thus, since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or ground water.[7]

III

State Law

Petitioners in both cases argue that the Federal Government must perfect its implied water rights according to state law. They contend that the Desert Land Act of 1877, 19 Stat. 377, 43 U. S. C. § 321, and its predecessors[8] severed nonnavigable water from public land, subjecting it to state law. That Act, however, provides that patentees of public land acquire only title to land through the patent and must acquire water rights in nonnavigable water in accordance with state law. *Cali-*

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[7] Petitioners in both cases argue that the effect of applying the implied-reservation doctrine to diversions of groundwater is to prohibit pumping from the entire 4,500 square miles above the aquifer that supplies water to Devil's Hole. First, it must be emphasized that the injunction limits but does not prohibit pumping. Second, the findings of fact in this case relate only to wells within 2½ miles of Devil's Hole. No proof was introduced in the District Court that pumping from the same aquifer that supplies Devil's Hole, but at a greater distance from Devil's Hole, would significantly lower the level in Devil's Hole. Nevada notes that such pumping "will in time affect the water level in Devil's Hole." Brief for Nevada 25. There was testimony from a research hydrologist that substantial pumping 40 miles away "[o]ver a period of perhaps decades [would have] a small effect." App. 79.

[8] The predecessors of the Desert Land Act of 1877 are the Act of July 26, 1866, c. 262, 14 Stat. 251, and the Act of July 9, 1870, 16 Stat. 217. Those Acts provided that water rights vested under state law or custom are protected. However, the Cappaerts did not have any vested water rights in 1952. See n. 5, *supra*.

fornia Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U. S. 142, 162 (1935); see Morreale, Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation," 20 Rutgers L. Rev. 423, 432 (1966).[9] This Court held in *FPC* v. *Oregon*, 349 U. S. 435, 448 (1955), that the Desert Land Act does not apply to water rights on federally reserved land.[10]

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[9] The cases relied upon by the Cappaerts are not to the contrary. *E. g.*, *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950); *Ickes* v. *Fox*, 300 U. S. 82 (1937); *Dority* v. *New Mexico ex rel. Bliss*, 341 U. S. 924 (1951). None involve a federal reservation and all involve a determination whether water rights had vested under state law. Here a federal reservation is involved and neither the Cappaerts nor their predecessors in interest had any vested water rights in 1952 when the United States' water rights vested.

Nebraska v. *Wyoming*, 325 U. S. 589 (1945), also relied upon by the Cappaerts, involved a federal reservation pursuant to the Reclamation Act of June 17, 1902, 32 Stat. 388, which directs the Secretary of the Interior to "proceed in conformity with [state] laws" and which provides that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." In *Nebraska* v. *Wyoming*, the Court noted that the United States had acted in conformity with state law. The Court said: "We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made." 325 U. S., at 615. Here the United States acquired reserved water rights through a reservation authorized, not by the Reclamation Act, but by the Antiquities Act.

[10] Nevada argues that the discussion of the implied-reservation doctrine in *FPC* v. *Oregon* was dictum as that case involved the supremacy of the Federal Power Act, 49 Stat. 863, 16 U. S. C. §§ 791a–825r (1952 ed., Supp. II) over state law. To the extent that the Federal Power Act authorized reservation of unappropriated water for the electrical needs of the federal project, so too did the Antiquities Act authorize implicit reservation of unappropriated water for the purposes of the Devil's Hole reservation.

The Cappaert petitioners argue that *FPC* v. *Oregon, supra,* must be overruled since, *inter alia,* the Court was unaware at the time that case was decided that there was no longer any public land available for homesteading. However, whether or not there was public land available for homesteading in 1955 is irrelevant to the meaning of the 1877 Act. The Desert Land Act still provides that the water rights of those who received their land from federal patents are to be governed by state law. That there may be no more federal land available for homesteading does not mean the Desert Land Act now applies to all federal land. Since the Act is inapplicable, determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation; the fact that the water rights here reserved apply to nonnavigable rather than navigable waters is thus irrelevant.

Since *FPC* v. *Oregon, supra,* was decided, several bills have been introduced in Congress to subject at least some federal water uses to state appropriation doctrines, but none has been enacted into law. The most recent bill, S. 28, 92d Cong., 1st Sess., was introduced on January 25, 1971, and reintroduced under the same number in the 93d Cong., 1st Sess., on January 4, 1973. See Morreale, *supra.*

Federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts; federal courts have jurisdiction under 28 U. S. C. § 1345 to adjudicate the water rights claims of the United States.[11] *Colorado River Water Cons. Dist.* v. *United States,* 424 U. S., at 807–809. The McCarran Amendment, 66 Stat. 560, 43 U. S. C. § 666, did not repeal § 1345 jurisdiction as applied to water rights. 424 U. S., at 808–809. Nor, as Nevada suggests,

[11] See n. 2, *supra.*

is the McCarran Amendment a substantive statute, requiring the United States to "perfect its water rights in the state forum like all other land owners." Brief for Nevada 37. The McCarran Amendment waives United States sovereign immunity should the United States be joined as a party in a state-court general water rights' adjudication, *Colorado River Water Cons. Dist.* v. *United States, supra,* at 808, and the policy evinced by the Amendment may, in the appropriate case, require the United States to adjudicate its water rights in state forums. *Id.,* at 817–820.

IV

Res Judicata

Finally, Nevada, as intervenor in the Cappaerts' suit, argued in the Court of Appeals that the United States was barred by res judicata or collateral estoppel from litigating its water-rights claim in federal court. Nevada bases this conclusion on the fact that the National Park Service filed a protest to the Cappaerts' pumping permit application in the state administrative proceeding. Since we reject that contention, we need not consider whether the issue was timely and properly raised. We note only that the United States was not made a party to the state administrative proceeding;[12] nor was the United States in privity with the Cappaerts. See *Blonder-Tongue Labs., Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 320–326 (1971). When the United States appeared to protest in the state proceeding it did not assert any federal water-rights claims, nor did it seek to adjudicate any claims until the hydrological studies as to the effects of the Cappaerts' pump-

[12] The cases petitioners in both cases rely upon involve parties who collaterally attacked an administrative determination. Here the United States was never a party.

ing had been completed.[13] The fact that the United States did not attempt to adjudicate its water rights in the state proceeding is not significant since the United States was not a party. The State Water Engineer's decree explicitly stated that it was "subject to existing rights"; thus, the issue raised in the District Court was not decided in the proceedings before the State Engineer. See *Blonder-Tongue Labs., Inc.* v. *University of Illinois Foundation, supra,* at 323. Cf. *United States* v. *Utah Constr. & Min. Co.,* 384 U. S. 394, 422 (1966).

We hold, therefore, that as of 1952 when the United States reserved Devil's Hole, it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value and thereby implement Proclamation No. 2961. Accordingly, the judgment of the Court of Appeals is

Affirmed.

[13] The United States requested either that the permits be denied or decision postponed until the studies were completed. While the State Engineer did not postpone decision on the permit application, the Cappaerts' attorney said that the studies "will go forward whether or not the applications are granted; so let's not make the mistake of thinking that if these applications are granted the studies are moot, they are not." App. 307.

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RADZANOWER *v.* TOUCHE ROSS & CO. ET AL.*

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75-268. Argued March 30, 1976—Decided June 7, 1976

Venue in a suit against a national banking association charged with violating the Securities Exchange Act of 1934 *held* to be governed by the venue provision of the National Bank Act, 12 U. S. C. § 94, which provides that an action against a national banking association may be had in any federal district court within the district in which such association may be established, rather than by § 27 of the Securities Exchange Act, which provides that any action to enforce any liability or duty under that Act may be brought in any district where the violation occurred or in the district wherein the defendant is found or transacts business. Pp. 152–158.

(a) Under a basic principle of statutory construction, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U. S. 535, 550–551. Pp. 153–154.

(b) A *pro tanto* repeal of § 94 by implication is not indicated on the ground that the two Acts are irreconcilable, since the underlying purpose of the Securities Exchange Act (enacted 70 years after the National Bank Act) was, not to regulate the activities of national banks as such, but to promote fair dealing on the securities markets; and the broad § 27 venue provision was intended to further that goal by enabling enforcement suits to be brought wherever a defendant could be found, whereas the narrow § 94 venue provision was intended for the convenience of banking institutions, and to prevent interruption of their business that might result from their books being sent great distances. In the very few instances where actions for securities violations are brought against banking institutions the requirement that suit be

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*[REPORTER'S NOTE: This case was docketed under the caption shown. However, the respondent is the First National Bank of Boston. Touche Ross & Co. and others besides the bank, though parties defendant, were not parties to the proceeding in the Court of Appeals and are not respondents in this Court.]

brought where the defendant is established is no insurmountable burden. Pp. 154–157.

(c) Nor is repeal of § 94 to be implied on the ground that the later securities statute covers the whole subject of the earlier bank statute. The subjects covered by the two statutes are wholly different, and nothing in the legislative history of the securities statute manifests an intention to *pro tanto* repeal § 94. Pp. 157–158.

516 F. 2d 896, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 158.

Ira Jay Sands argued the cause for petitioners. With him on the briefs was *Samuel Gottlieb*.

Samuel E. Gates argued the cause for respondent. With him on the briefs was *Richard I. Janvey*.†

MR. JUSTICE STEWART delivered the opinion of the Court.

This case requires us to determine which venue provision controls in the event a national banking association is sued in a federal court for allegedly violating the Securities Exchange Act of 1934: the broad venue provision of the Securities Exchange Act, which allows suits under that Act to be brought in any district where the defendant may be found, or the narrow venue provision of the National Bank Act, which allows national

†*David Ferber* and *David J. Romanski* filed a brief for the Securities and Exchange Commission as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *C. Westbrook Murphy* for the Comptroller of the Currency; by *William Eldred Jackson* and *Briscoe R. Smith* for the Chase Manhattan Bank; and by *Donald J. Yellon* and *William B. Davenport* for the First National Bank of Chicago.

banking associations to be sued only in the district where they are established.

The petitioner, Hyman Radzanower, instituted a class action in the District Court for the Southern District of New York alleging, *inter alia*, that the respondent, First National Bank of Boston, a national banking association with its principal office in Boston, Mass., had violated the federal securities laws by failing to disclose to the Securities and Exchange Commission and the investing public its knowledge of certain adverse financial information about one of its customers, the TelePrompter Corporation, and of securities laws violations by that company. The complaint alleged that venue was proper under § 27 of the Securities Exchange Act of 1934, 48 Stat. 902, 15 U. S. C. § 78aa, which provides that "[a]ny suit or action to enforce any liability or duty created [by or under the Securities Exchange Act] . . . may be brought in any such district [wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business . . . ." The bank moved to dismiss the complaint as to it, asserting that venue as to it lay only under the venue provision of the National Bank Act, Rev. Stat. § 5198 (1878), 12 U. S. C. § 94. That section provides that "[a]ctions and proceedings against any [national banking] association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established . . . ."[1]

[1] Section 94 in its entirety reads:

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county

Following the settled law of the Second Circuit, the District Court granted the bank's motion to dismiss. It held that "[a]bsent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U. S. C. Section 94." The court noted that the bank was established in Boston "because its charter specifies Boston as its principal place of business," [2] and it rejected the petitioner's claim that the bank had waived the provisions of § 94.[3] The Court of Appeals affirmed without opinion.[4] Because of differing views in the Circuits as to the statutory venue question presented,[5] we granted the petition for certiorari. 423 U. S. 911.

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or city in which said association is located having jurisdiction in similar cases."

[2] The petitioner does not claim that the bank is "established" anywhere else than in Boston. Federal courts have consistently ruled that the place specified in a bank's charter as its home office is determinative of the district in which the bank is "established" for purposes of § 94. See, *e. g., Buffum* v. *Chase Nat. Bank,* 192 F. 2d 58, 60 (CA7); *Leonardi* v. *Chase Nat. Bank,* 81 F. 2d 19, 22 (CA2).

[3] The opinion of the District Court is unreported.

It has long been settled that the restrictive venue provisions of § 94 can be waived by a defendant bank. See, *e. g., Charlotte Nat. Bank* v. *Morgan,* 132 U. S. 141, 145; *Michigan Nat. Bank* v. *Robertson,* 372 U. S. 591, 594; *National Bank* v. *Associates of Obstetrics,* 425 U. S. 460.

Although the parties each devoted a portion of their briefs to the waiver issue, that issue was not raised in the petition for certiorari. Since we consider "[o]nly the questions set forth in the petition or fairly comprised therein," this Court's Rule 23 (1)(c), we have no occasion to pass on the correctness of the decisions below on the waiver question.

[4] The judgment of the Court of Appeals is reported at 516 F. 2d 896.

[5] The Second and Ninth Circuits have concluded that § 94 is the exclusive venue provision governing suits against national banking associations, while the Third Circuit has ruled that such suits may

Section 94 provides that suits against a national banking association "may be had" in the federal district court for the district where such association is established. The Court has held that this grant of venue is mandatory and exclusive: "The phrase 'suits . . . may be had' was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit and we believe Congress intended that in those courts alone could a national bank be sued against its will." *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 560. Accord, *Michigan Nat. Bank* v. *Robertson*, 372 U. S. 591; *National Bank* v. *Associates of Obstetrics*, 425 U. S. 460.[6] The venue provision of the Securities Exchange Act, by contrast, allows suits under that Act to be brought anywhere that the Act is violated or a defendant does business or can otherwise be found. It is the petitioner's contention that when a national bank is named as a defendant in a suit brought under the Securities Exchange Act, it loses the protection of the venue provisions of § 94 and may be sued in any federal judicial district where that Act was violated or where it does

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also be brought pursuant to § 27 of the Securities Exchange Act. Compare *Bruns, Nordeman & Co.* v. *American Nat. Bank*, 394 F. 2d 300 (CA2), and *United States Nat. Bank* v. *Hill*, 434 F. 2d 1019 (CA9), with *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 483 F. 2d 852 (CA3).

[6] When the *Langdeau* Court held that the words "may be had" serve to provide mandatory and exclusive venue, it was dealing with the relationship of § 94 to a state venue statute. Since the same words are used in connection with the federal-court venue provision, the same construction is virtually inescapable. "[I]t would indeed strain language to say that the same verbs were merely permissive with respect to suits in federal courts although prohibitory as to actions in state ones." *Bruns, Nordeman & Co.* v. *American Nat. Bank*, *supra*, at 303.

business or can be found. For the reasons that follow, we cannot accept that contention.

It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U. S. 535, 550–551.[7] "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874).[8]

When Congress enacted the narrow venue provisions of the National Bank Act, it was focusing on the particularized problems of national banks that might be sued in the state or federal courts. When, 70 years later,

[7] See *Brown* v. *GSA*, 425 U. S. 820; *Bulova Watch Co.* v. *United States*, 365 U. S. 753, 758; *Rodgers* v. *United States*, 185 U. S. 83, 87–89 ("It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute"); *Ex parte Crow Dog*, 109 U. S. 556, 570–571. See also *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222; *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561 (specific venue statutes for patent suits prevail over general venue statutes).

[8] See also 1A J. Sutherland, Statutes and Statutory Construction § 23.15 (4th ed. C. Sands 1972).

Congress enacted the Securities Exchange Act, its focus was on the objective of promoting fair dealing in the securities markets, and it enacted a general venue provision applicable to the broad universe of potential defendants subject to the prohibitions of that Act. Thus, unless a "clear intention otherwise" can be discerned, the principle of statutory construction discussed above counsels that the specific venue provisions of § 94 are applicable to the respondent bank in this case. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222.

The issue thus boils down to whether a "clear intention otherwise" can be discovered—whether, in short, it can be fairly concluded that the venue provision of the Securities Exchange Act operated as a *pro tanto* repeal of § 94. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168.[9] There are, however,

> "two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . ." *Posadas* v. *National City Bank*, 296 U. S. 497, 503.

It is evident that the "two acts" in this case fall into neither of those categories.

[9] See also *Gordon* v. *New York Stock Exchange*, 422 U. S. 659, 682; *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 133; *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357; *United States* v. *Borden Co.*, 308 U. S. 188, 198–199.

The statutory provisions at issue here cannot be said to be in "irreconcilable conflict" in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton* v. *Mancari, supra,* at 551. As the Court put the matter in discussing the interrelationship of the antitrust laws and the securities laws: "Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 357.[10]

Here the basic purposes of the Securities Exchange Act can be fairly served by giving full effect to the provisions of 12 U. S. C. § 94. The primary purpose of the Securities Exchange Act was not to regulate the activities of national banks as such but "[t]o provide fair and honest mechanisms for the pricing of securities [and] to assure that dealing in securities is fair and without undue preferences or advantages among investors . . . ." H. R. Rep. No. 94–229, p. 91 (1975).[11]

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[10] See also *Gordon* v. *New York Stock Exchange, supra,* at 685; *United States* v. *National Assn. of Securities Dealers,* 422 U. S. 694, 734–735.

[11] The legislative history of the Securities Acts does not indicate that Congress considered banks as likely defendants in actions brought under those Acts. While Congress did examine problems stemming from the relationship of banks and the securities business in the early 1930's, see S. Rep. No. 1455, 73d Cong., 2d Sess. (1934), it dealt with those problems in comprehensive legislation dealing only with banks. See Banking Act of 1933, 48 Stat. 162. See generally *Investment Co. Institute* v. *Camp,* 401 U. S. 617.

Its venue provision, § 27, was intended to facilitate that goal by enabling suits to enforce rights created by the Act to be brought wherever a defendant could be found. The venue provision of the National Bank Act, § 94, was intended, on the other hand, "for the convenience of those [banking] institutions, and to prevent interruption in their business that might result from their books being sent to distant counties . . . ." *Charlotte Nat. Bank* v. *Morgan,* 132 U. S. 141, 145, quoted in *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S., at 561–562, n. 12.

By allowing suits against national banks to be brought only pursuant to § 94, the purposes of that section will obviously be served. Yet application of § 94 will not "unduly interfere" with the operation of the Securities Exchange Act. See *Gordon* v. *New York Stock Exchange,* 422 U. S. 659, 686. Section 94 will have no impact whatever upon the vast majority of lawsuits brought under that Act. In the tiny fraction of litigation where its effect will be felt, it will foreclose nobody from invoking the Act's provisions. Members of the investing public will still be free to bring actions against national banks under the Act. While suits against this narrow and infrequent category of defendants will have to be brought where the defendant is established, that is hardly an insurmountable burden in this day of easy and rapid transportation.[12] Since it is possible for the statutes to coexist in this manner, they are not so repugnant

[12] The SEC has suggested that its enforcement activity under the Securities Exchange Act will be hindered in cases of securities law violations by geographically dispersed banks, if it cannot sue all defendants, including the banks, in one proceeding. The SEC, however, was unable to cite a single instance in the last 40 years where this situation has arisen. In any event, policy arguments such as this are more appropriately addressed to Congress than to this Court. See *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555, 563.

to each other as to justify a finding of an implied repeal by this Court. It is simply not "necessary" that § 94 be repealed in part in order "to make the Securities Exchange Act work." See *Silver* v. *New York Stock Exchange, supra,* at 357.

Moreover, it cannot be said either that "the later act covers the whole subject of the earlier one and is clearly intended as a substitute," or that "the intention of the legislature to repeal [is] clear and manifest." 296 U. S., at 503. The Securities Exchange Act of 1934 covers a "subject" quite different from the National Bank Act. The 1934 Act was enacted primarily to halt securities fraud, not to regulate banks. Indeed, banks were specifically exempted from many provisions of the securities laws,[13] and Congress almost contemporaneously enacted other specific legislation dealing with the problems arising from banks' involvement in the securities business.[14] The passage of that legislation and the exemption of national banks from important provisions of the securities laws suggest, if anything, that Congress was reaffirming its view that national banks should be regulated separately by specific legislation applying only to them.[15] And there is nothing in the legislative history of

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[13] See 15 U. S. C. §§ 77c (a)(2), 77*l* (2); cf. 15 U. S. C. § 78c (a)(6).

[14] See n. 11, *supra.*

[15] This intention was expressly stated by Congress when it exempted bank securities from the registration-statements requirements of the Securities Act of 1933: "[A]dequate supervision over the issuance of securities of a national bank is exercised by the Comptroller of the Currency." H. R. Rep. No. 85, 73d Cong., 1st Sess., 14 (1933). Subsequent Congresses have continued to follow this policy. For example, while national banks are subject to the registration, reporting, and proxy requirements of the Securities Exchange Act, in 1964 Congress amended the Act so that the administration of those parts of the Act with respect to banks was transferred from the SEC to the various federal banking authorities. See § 3 (e), 78 Stat. 568, 15 U. S. C. § 78*l* (i).

the Securities Exchange Act to support the view that Congress in enacting it gave the slightest consideration to the *pro tanto* repeal of § 94, let alone to indicate "that Congress consciously abandoned its [prior] policy," *Morton* v. *Mancari*, 417 U. S., at 551, or that its intent to repeal § 94 *pro tanto* was "'clear and manifest,'" *United States* v. *Borden Co.*, 308 U. S. 188, 198, quoting *Red Rock* v. *Henry*, 106 U. S. 596, 602.[16]

For these reasons it is impossible to conclude that § 94 was partially repealed by implication in 1934. It follows under the general principles of statutory construction discussed above that the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act. We conclude, therefore, that a national banking association is subject to suit under the Securities Exchange Act only in that district wherein it is established, and that the judgment before us must accordingly be affirmed.

It is so ordered.

MR. JUSTICE STEVENS, dissenting.

In my judgment a brief reference to the history, purpose, and language of these two special venue statutes will provide a better guide to their meaning than the exposition of the doctrine of implied repeal found in the treatise on statutory construction written by Sedgwick in 1874. Indeed, if Sedgwick were to be our guide, I would heed this advice: "When acts can be harmonized by a fair and liberal construction it must be done." [1]

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[16] In 1959 Congress reviewed the National Bank Act and adopted an Act designed "to repeal certain [national banking] laws which have become obsolete." See Pub. L. 86–230, 73 Stat. 457. When it did so, it did not repeal § 94.

[1] T. Sedgwick, The Interpretation and Construction of Statutory

It is worth repeating that both of these statutes are special venue statutes. Neither party relies on the general venue provision in 28 U. S. C. § 1391. One relies on a special statute for one kind of litigant—national banks; the other relies on a special statute for one kind of litigation—cases arising under the Securities Exchange Act of 1934. The precise issue before us involves only a tiny fraction of the cases in either special category: Most litigation against national banks does not arise under the Securities Exchange Act; and most litigation arising under the Securities Exchange Act does not involve national banks. Thus, with equal logic we might describe either statute as creating an exception from the somewhat more general provisions of the other.

The rule that the legislature presumably intended to give effect to the more specific statute could therefore be applied to support the petitioner, as well as the respondent bank, in this case.[2] Similarly, without pausing to consider the reason why each statute was enacted, we might simply apply the rule that the more recent of two

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and Constitutional Law 98 n. (a) (2d ed. 1874). Coincidentally, this advice is found on the same page from which the Court quotes, *ante*, at 153. We have repeated this principle of statutory construction many times. See, *e. g.*, *United States* v. *Borden Co.*, 308 U. S. 188, 198: "When there are two acts upon the same subject, the rule is to give effect to both if possible."

[2] The rule that the more specific legislation will usually take precedence over the more general rests on the quite reasonable assumption that the legislature's attention was probably focused more directly on the subject matter of the specific than on only one aspect of a much broader subject matter. But since the venue provision of the Civil War banking legislation was a relatively inconsequential part of the entire statute, there is no reason to assume that it was given any more attention than the venue provision in the Securities Exchange Act of 1934.

conflicting statutes shall prevail,[3] rather than the rule that the special statute takes precedence over the general. But such abstract reasoning is less instructive than a consideration of the source and the need for the alleged conflict. Of special importance is an evaluation of the intent of Congress when it enacted these statutes.

The source of the special venue statute for national banks is the Act to Provide a National Currency enacted in 1863[4] and amended in 1864.[5] When these statutes were enacted, Congress apparently assumed that the

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[3] Sedgwick quotes this familiar rule with approval: "*Leges posteriores, priores contrarias abrogant.* 'If two inconsistent acts be passed at different times, the last,' said the Master of the Rolls, 'is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law; and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment.'" Sedgwick, *supra*, at 104. See also *United States* v. *Tynen*, 11 Wall. 88, 92.

[4] 12 Stat. 665, 681.

[5] The federal venue provision was first enacted in 1863, 12 Stat. 681, and in the following year, the provision was amended to authorize suit in state courts. Section 57 of the 1864 Act, which is the predecessor of 12 U. S. C. § 94, reads, in pertinent part as follows:

"SEC. 57. *And be it further enacted*, That suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however*, That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." 13 Stat. 116.

newly authorized national banks would not be subject to suit in state courts unless Congress gave its express consent.[6] The fact that the statute was phrased in permissive language suggests that Congress' primary purpose was to give such consent. The mandatory construction given to that language a century later when the Court decided *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, is consistent with that purpose because it is unlikely that the Civil War Congress intended to authorize the several States to subject national banks to the potential harassment of defending litigation in places other than the county or city where the bank was located.[7] This reason for placing a mandatory limiting construction on the authorization for suit in the state courts is not applicable to the separately enacted federal venue provision; for in any event the federal courts could only entertain such litigation against national banks as Congress might authorize.

In 1934 when Congress enacted the Securities Exchange Act, there was no reason for it to assume that the language in the special jurisdictional and venue provisions of that statute would not apply to national banks. *Langdeau* would not be decided until almost 30 years later, the language in the venue provision of the Civil War banking legislation was permissive, and there was no recognized policy reason supporting an exceptional venue privilege for national banks in federal litigation. There was no longer any doubt about the suability of national banks in either state or federal courts. Moreover, what once might have been regarded as the significant burden of requiring a fledgling bank to haul its records from one county to another within

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[6] See *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141, 144; *First Nat. Bank* v. *Union Trust Co.*, 244 U. S. 416, 428.

[7] *Charlotte Nat. Bank* v. *Morgan*, *supra*, at 145.

the State, would hardly justify treating banks differently from other litigants in the 20th century.

On the other hand, the special venue section included in the Securities Acts was specifically designed to implement an important legislative objective. Indeed, in construing the comparable provision in the 1933 statute, the Court held that its benefits are so crucial to the legislative purpose that they cannot be waived.[8] In contrast, it is well settled that a national bank's special venue privilege is waivable.[9] Manifestly, there is a

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[8] "The Act's special right is enforceable in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited. If suit be brought in a federal court, the purchaser has a wide choice of venue, the privilege of nation-wide service of process and the jurisdictional $3,000 requirement of diversity cases is inapplicable." *Wilko* v. *Swan*, 346 U. S. 427, 431. Referring to the analogous provision in the Federal Employers' Liability Act, the Court added: "We said the right to select the 'forum' even after the creation of a liability is a 'substantial right' and that the agreement, restricting that choice, would thwart the express purpose of the statute. We need not and do not go so far in this present case. By the terms of the agreement to arbitrate, petitioner is restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require petitioner to sue, a waiver in advance of a controversy stands upon a different footing. . . . On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights." *Id.*, at 438.

[9] "No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary." *Charlotte Nat. Bank* v. *Morgan, supra*, at 145.

See also *Michigan Nat. Bank* v. *Robertson*, 372 U. S. 591, 594; *National Bank* v. *Associates of Obstetrics*, 425 U. S. 460.

difference between the importance of the policies underlying the two statutes.

But there is no necessary conflict. Since the two Acts can be harmonized by a fair and liberal construction, if we heed Sedgwick's counsel, that "must be done." As already noted, the actual wording of the earlier statute, which used the words "may be had" provides no conflict with a literal reading of the later Act. The conflict is created solely by this Court's interpretation of those words as, in effect, meaning that the trial of a case against a national bank "must be had" in the place specified by Congress rather than the place specified by a state legislature. If we so read the statute, we need only conclude that any later enacted special venue statute which, by its own terms, applies to national banks should be read to mean what it says. Preoccupation with the ancient doctrine of implied repeal should not foreclose this simple construction of the plain language of the 1934 Act.[10]

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[10] Although the Second Circuit decision in *Bruns, Nordeman & Co.* v. *American Nat. Bank,* 394 F. 2d 300, 303 (1968), supports the result reached by the Court in this case, Judge Friendly expressed the opinion that if the court were writing on a clean slate, it would have reached a contrary conclusion; it reached the result it did only because it felt bound by a prior decision of the Second Circuit which it characterized as giving "a construction to the clause of § 94 dealing with the venue of suits in a federal court quite as Draconian as the Supreme Court has done with respect to the state court clause." The earlier Second Circuit precedent made no analysis of the question whether the clause should be given a mandatory or permissive construction. See *Leonardi* v. *Chase Nat. Bank,* 81 F. 2d 19 (1936). It is also noteworthy that when the Third Circuit considered the question, it concluded that the venue provision of the Securities Exchange Act should be accepted at face value. See *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F. 2d 852 (1973); contra: *United States Nat. Bank* v. *Hill,* 434 F. 2d 1019 (CA9 1970). The American Law Institute,

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The rule that repeals by implication are not favored, like all other canons of statutory construction, is merely one of the guidelines to observe in the search for a construction which will best reflect the real intent of the legislature. When we are dealing with a well-established and clearly defined old rule, it is usually reasonable to suppose that the legislative intent to change such a rule would be unambiguously expressed. Or if we are dealing with an old rule that is an established and important part of our national policy, we must be sure that it is not changed simply by inadvertent use of broad statutory language. Thus, if Congress intended to modify the long-settled practice of preferential hiring of Indians on Indian reservations,[11] or to limit the coverage of a statute as important as the Sherman Act,[12] a court would require an unambiguous expression of intent to make such a change; without such an expression it is reasonable to believe that inadvertence, rather than an intent to repeal, is the actual explanation for the broad language that arguably changes the old rule.[13] But if neither the

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Study of the Division of Jurisdiction between State and Federal Courts 413 (1969), pointed out that there "is no obvious reason why a national bank requires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purposes of venue."

[11] The policy of according hiring preference to Indians in the Bureau of Indian Affairs which was involved in *Morton* v. *Mancari*, 417 U. S. 535, 550–551, was not only perfectly clear but had been consistently recognized since at least as far back as 1934.

[12] See, *e. g.*, *United States* v. *Borden Co.*, 308 U. S. 188, 198; *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 350–351; *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 359; *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719–720.

[13] When Congress intends to change a well-recognized and well-established rule of law, it customarily provides us with evidence of that specific intent. But it is unrealistic to expect the Legislature to consider and expressly mention the impact of a new statute on every old rule that it may modify, particularly if the old rule is not

existence of, nor the reason for, the old rule is clear at the time of the later enactment, there is no special reason for questioning the legislative intent to have the later statute mean exactly what it says. Specifically, in this case, since it is clear that Congress intended national banks to be covered by some sections of the Securities Exchange Act, but not others,[14] and since the purpose of authorizing a broader venue in this type of litigation applies with equal force to national banks and other defendants, the canon of construction strikes me as an unreliable guide for ascertaining the true intent of Congress.

Congress may well have simply overlooked the special venue provision in the Civil War statute, particularly since *Langdeau* had not yet been decided. It may therefore be accurate to describe the omission of any reference to the earlier statute in the legislative history of the later one as inadvertent. But that merely raises the question of whether it is more realistic to imply an exception to the applicable language of the 1934 Act or to conclude that if Congress had thought about this preference for national banks it nevertheless would have enacted the statute it did enact in 1934. There is no doubt in my mind that the 1934 Congress would have done exactly what it did do even if it had foreseen not

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only unimportant but not even clearly stated at the time the new statute is enacted. In such a setting the new statute should be interpreted in the light of its own history with the expectation that a certain amount of ancient underbrush will inevitably be cut away. Only to the extent that the old roots retain sufficient vitality to support some desirable and discernible purpose at the time of the later enactment is there any real justification for avoiding an implied repeal.

[14] The Securities Act of 1933 contains explicit exemptions for national banks at 15 U. S. C. §§ 77c (a)(2), 77*l* (2), as does the Securities Exchange Act at 15 U. S. C. § 78*l* (i).

only this Court's decision in *Langdeau* but also the Court's willingness to construe the federal venue provision in the same "Draconian" fashion as the state provision, to use Judge Friendly's typically appropriate adjective. I could understand a legislative decision to exempt banks entirely from the coverage of the new law on the theory that an interest in the solvency of national banks entitles them to special immunity, but it seems wholly unrealistic to assume that Congress would treat banks like all other defendants for liability purposes and yet treat them differently for venue purposes.

It is true that we are dealing with only a tiny fraction of the litigation arising under the 1934 Act or of the litigation involving national banks. But that fact merely minimizes the likelihood that a busy Congress will correct an inequitable and anachronistic situation. It is also true that holding the trial in one forum rather than another is hardly an insurmountable burden on either the plaintiff or the bank in this day of easy and rapid transportation—unlike the situation in the Civil War period when the statute that the Court considers controlling was enacted—but the burden on the judiciary is increased by requiring multiple trials whenever national banks participate in an allegedly unlawful securities offering.

In sum, whatever canon of statutory construction is applied, I am persuaded that we are most apt to reflect the intent of Congress faithfully if we give effect to the plain meaning of the 1934 Act and thereby place banks on an equal footing with other corporations which must defend litigation of this kind.

I therefore respectfully dissent.

HANCOCK, ATTORNEY GENERAL OF KENTUCKY *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74–220. Argued January 13, 1976—Decided June 7, 1976

Although § 118 of the Clean Air Act obligates federal installations discharging air pollutants to join with nonfederal facilities in complying with state "requirements respecting control and abatement of air pollution," obtaining a permit from a State with a federally approved implementation plan is not among such requirements. There cannot be found in § 118, either on its face or in relation to the Act as a whole, nor can there be derived from the legislative history of the Clean Air Amendments of 1970, any clear and unambiguous declaration by Congress that such federal installations may not operate without a state permit. Nor can congressional intention to submit federal activity to state control be implied from the claim that under the State's federally approved plan it is only through the permit system that compliance schedules and other requirements may be administratively enforced against federal installations. Pp. 178–199.

497 F. 2d 1172, affirmed.

WHITE, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 199.

David D. Beals, Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the briefs were *Ed W. Hancock,* Attorney General, *pro se,* and *David C. Short,* Assistant Attorney General.

Deputy Solicitor General Friedman argued the cause for respondents. On the brief were *Solicitor General Bork, Assistant Attorney General Johnson, Deputy Solic-*

itor General Randolph, Jacques B. Gelin, Robert L. Klarquist, Robert H. Marquis, Herbert S. Sanger, Jr., and *Beauchamp E. Brogan.**

MR. JUSTICE WHITE delivered the opinion of the Court.

The question for decision in this case is whether a State whose federally approved implementation plan forbids an air contaminant source to operate without a state permit may require existing federally owned or operated installations to secure such a permit. The case presents an issue of statutory construction requiring examination of the Clean Air Act, as amended, 42 U. S. C. § 1857 *et seq.*, and its legislative history in light of established constitutional principles governing the determination of whether and the extent to which federal installations have been subjected to state regulation.[1] The specific question is whether obtaining a permit to operate

*Briefs of *amici curiae* urging reversal were filed by *William J. Baxley*, Attorney General, and *Henry H. Caddell* and *Frederick S. Middleton III*, Assistant Attorneys General, for the State of Alabama; by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg* and *Richard G. Berger*, Assistant Attorneys General for the State of New York; by *John L. Hill*, Attorney General, *David M. Kendall*, First Assistant Attorney General, and *Philip K. Maxwell*, Assistant Attorney General, for the State of Texas; by *Andrew P. Miller*, Attorney General, and *J. Thomas Steger*, Assistant Attorney General, for the Commonwealth of Virginia; and by *Evelle J. Younger*, Attorney General, *Robert H. O'Brien* and *Carl Boronkay*, Assistant Attorneys General, and *Nicholas C. Yost*, *Roderick Walston*, *Daniel Taaffe*, and *C. Foster Knight*, Deputy Attorneys General, for the State of California et al., joined by *Arthur K. Bolton*, Attorney General, and *Robert E. Hall*, Assistant Attorney General, for the State of Georgia.

[1] In *EPA* v. *California ex rel. State Water Resources Control Board*, *post*, p. 200, also decided this day, we consider a closely related issue under the Federal Water Pollution Control Act, as amended, 33 U. S. C. § 1251 *et seq.* (1970 ed., Supp. IV).

is among those "requirements respecting control and abatement of air pollution" with which existing federal facilities must comply under § 118 of the Clean Air Act.[2]

I

Last Term in *Train* v. *Natural Resources Defense Council,* 421 U. S. 60 (1975), we reviewed the development of federal air pollution legislation through the Clean Air Amendments of 1970 (Amendments)[3] and observed that although the Amendments "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," they "explicitly preserved the principle" that " '[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ,' " *id.,* at 64, quoting from § 107 (a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U. S. C. § 1857c–2 (a). Consistently with this principle, the Amendments required that within nine months after the Environmental Protection Agency (EPA) promulgated the primary and secondary ambient air quality standards required by § 109 (a) of the Clean Air Act, as added, 84 Stat. 1679, 42 U. S. C. § 1857c–4 (a),[4] for certain air pollutants,[5] each State submit to the EPA a plan by which it would implement and maintain those standards within its territory. § 110 (a)(1) of the Clean Air Act, as added, 84 Stat. 1680, 42 U. S. C. § 1857c–5 (a)(1). See 40 CFR pt. 51 (1975). The EPA was required to approve each State's

[2] As renumbered and amended, 84 Stat. 1689, 42 U. S. C. § 1857f.

[3] Pub. L. 91–604, 84 Stat. 1676.

[4] 36 Fed. Reg. 8186 (1971). See 40 CFR pt. 50 (1975). Title 40 CFR § 50.1 (e) (1975) defines "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access."

[5] The EPA is guided in compiling a list of air pollutants by § 108 (a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U. S. C. § 1857c–3 (a).

implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110 (a)(2).

For existing sources [6] the State must propose "emission limitations, schedules, and timetables for compliance with such limitations" necessary to meet the air quality standards. § 110 (a)(2)(B). As we observed in *Train, supra,* at 78–79, given the EPA's nationwide air quality standards, the State is to adopt a plan setting

> "the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards.
>
> "[The EPA] is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. . . . The Act gives [the EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a)(2). . . . Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." (Footnote omitted.)

Along with increasing federal authority and "taking a stick to the States" [7] by requiring them to implement the

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[6] The range of a State's initiative in meeting its primary responsibility to assure air quality is somewhat greater for existing sources of air pollution, such as those involved in this case, than for "new sources." See *infra,* at 190–194.

[7] *Train* v. *Natural Resources Defense Council,* 421 U. S. 60, 64 (1975).

federal standards promulgated pursuant to that authority, Congress also intended the Amendments "to strengthen the strictures against air pollution by federal facilities." [8] Before 1970, § 111 (a) of the Clean Air Act simply declared "the intent of Congress" to be that federal installations "shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with" federal and state air pollution control authorities "in preventing and controlling the pollution of the air in any area insofar as the discharge of any matter from or by such" federal installation "may cause or contribute to pollution of the air in such area." [9]

Experience with performance by federal sources of air pollution under this voluntary scheme [10] led the Congress to conclude that admonishing federal agencies to prevent and control air pollution was inadequate, because "[i]nstead of exercising leadership in controlling or eliminating air pollution" [11] "Federal agencies have been notoriously laggard in abating pollution." [12] Both to provide the leadership to private industry and to abate violations of air pollution standards by federal facilities, in 1970 Congress added § 118 to the Clean Air Act. The first sentence of the section provides:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of

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[8] Brief for Respondents 27.

[9] As amended, 81 Stat. 499, 42 U. S. C. § 1857f (a) (1964 ed., Supp. V).

[10] Congress first called on federal agencies to cooperate with efforts to reduce air pollution in 1959, Pub. L. 86–365, 73 Stat. 646.

[11] H. R. Rep. No. 91–1146, p. 4 (1970), 2 Legislative History of the Clean Air Amendments of 1970 (Comm. Print compiled for the Senate Committee on Public Works by the Library of Congress), p. 894 (1974) (hereafter Leg. Hist.).

[12] S. Rep. No. 91–1196, p. 37 (1970), 1 Leg. Hist. 437.

> the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 42 U. S. C. § 1857f.

The remainder of § 118 authorizes the President, upon a determination that it is "in the paramount interest of the United States to do so" and subject to several limitations, to exempt certain federal emission sources from "compliance with such a requirement." [13]

After enactment of § 118 there is no longer any question whether federal installations must comply with established air pollution control and abatement measures. The question has become how their compliance is to be enforced.

II

In February 1972, Kentucky submitted its implementation plan to the EPA. On May 31, 1972, the plan was approved by the Administrator in relevant part.[14] Chapter 7 of the plan included Kentucky Air Pollution Control Commission (Commission) Regulation No. AP–1, § 5 (1), which provides:

> "No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain

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[13] The full text of § 118 appears at n. 41, *infra*.

[14] 37 Fed. Reg. 10842, 10868–10869 (1972). Approval of the plan was later vacated because the EPA had not given interested persons an opportunity to participate in its consideration of the plan. *Buckeye Power, Inc.* v. *EPA*, 481 F. 2d 162 (CA6 1973). After resubmission to the EPA and publication as a proposed rulemaking, 39 Fed. Reg. 10277 (1974), the plan was approved with an exception not pertinent here. *Id.*, at 29357.

> or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect." [15]

An applicant for a permit must complete a form supplied by the Commission and, "when specifically requested by the Commission, include an analysis of the characteristics, properties, and volume of the air contaminants based upon source or stack samples of the air contaminants taken under normal operating conditions." [16] The process of review of the application may include hearings.[17] Permits are denied if the applicant does not supply the "information required or deemed necessary by the Commission to enable it to act upon the permit application," [18] or when "the air contaminant source will prevent or interfere with the attainment or maintenance of state or federal air quality standards." [19] When granted, a permit may be "subject to such terms and conditions set forth and embodied in the permit as the Commission shall deem necessary to insure compliance with its standards." [20] Once issued, a permit may be revoked or modified for failure to comply with the terms and conditions of the permit, with emission standards applicable to the air contaminant source, or with the

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[15] Pet. for Cert. 46a. Although § 5 (1) does not explicitly apply to federal facilities, the definition of "person" in § 2 (32) of the Regulation includes any "government agency . . . or other entity whatsoever." App. in No. 73–2099 (CA6), p. 111 (hereafter CA App.). The applicability of § 5 (1) to federal facilities as a matter of Kentucky law has not been disputed.

[16] Reg. AP–1 §§ 5 (2)(a), (c), CA App. 120.

[17] See generally Reg. AP–10, CA App. 209–227.

[18] Reg. AP–1, § 5 (2)(c), CA App. 120.

[19] *Id.*, § 5 (3)(a), CA App. 121.

[20] *Id.*, § 5 (4), CA App. 121.

ambient air standards for the area in which the air contaminant source is located. Reg. AP–1, § 5 (5), CA App. 122.

Soon after the implementation plan was approved, a Commission official wrote to numerous officials responsible for various Kentucky facilities of the United States Army,[21] of the Tennessee Valley Authority (TVA),[22] and of the Atomic Energy Commission (AEC) [23] requesting that they apply for and obtain permits as requested by the EPA-approved plan. The responses to these requests were to the effect that federally owned or operated facilities located in Kentucky were not required to secure an operating permit. Each response, however, either offered to or did supply the information and data requested on the standard permit application form.[24]

The Commission continued to press the federal officials

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[21] The Army facilities are the United States Army Armor Center and Fort Knox, Fort Campbell, and the Lexington and Blue Grass Activities, Lexington-Blue Grass Army Depot.

[22] Two TVA facilities are involved, the Shawnee and Paradise Power Plants.

[23] The AEC facility is the Paducah Gaseous Diffusion Plant for the production of enriched uranium, operated under contract by the Union Carbide Corp. Since the Commission initiated its efforts to secure a permit application from the AEC or its contractor, the Energy Research and Development Administration has succeeded to the AEC's responsibility for the Paducah plant. Pub. L. 93–438, 88 Stat. 1233; see 40 Fed. Reg. 3242, 3250 (1975).

[24] Fort Campbell officials, for example, after asserting that "current Department of the Army regulations do not allow us to apply for such a permit," submitted "pertinent information on our heating plants which appear to be covered by your regulations" and asked to be "advise[d] if any further information is desired." App. 48. TVA officials likewise disclaimed any duty to apply for a permit but submitted "the same emission data and other information for [TVA] power plants which your permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations." For the Commission's con-

to apply for operating permits. In October 1972, the Regional Administrator of the EPA sent a letter to the operators of all federal facilities in the region, including those to which the Kentucky officials had addressed their requests, and to the Commission. Setting forth EPA policy and the agency's interpretation of § 118 of the Clean Air Act,[25] the Regional Administrator stated: "It is clear that Section 118 . . . requires Federal facilities to meet state air quality standards and emission limitations and to comply with deadlines established in the approved state air implementation plans." App. 57. To aid the States in accomplishing these objections, wrote the Administrator, each federal facility should develop a compliance schedule and should provide "reasonable and specific" data requested by the State. *Id.*, at 58. On the question whether federal facilities must apply for state permits, the letter reiterated the EPA position that although "Federal agencies are [not] required to apply for state operating permits . . . [o]ur aim is to encourage Federal agencies to provide the states with all the information required to assess compliance of pollution sources with standards, emission and discharge limitations and the needs for additional abatement measures." [26] *Ibid.*

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venience, the TVA supplied the information on the Commission's own permit forms. *Id.*, at 52.

[25] In addition to § 118, the letter referred to Executive Order No. 11507, 3 CFR 889 (1966–1970 Comp.), which antedates the Amendments, as a policy source. This Order, cited in the complaint, has been superseded by Executive Order No. 11752, 3 CFR 380 (1974). See *infra*, at 199.

[26] The letter explained to the federal officials that the EPA's "advice on this matter, at this time, is to provide the data specifically requested by the states so they may make a determination as to: (1) the facilities compliance with the approved state air implementation plans and (2) the abatement action facilities must take in order to meet implementation plan requirements.

"We recommend that each Federal facility under your jurisdiction

Kentucky then brought this suit in the United States District Court for the Western District of Kentucky.[27] The complaint sought declaratory and injunctive relief requiring the Army, TVA, and AEC facilities to secure operating permits. Kentucky also named several EPA officials as defendants and asked the District Court to order them to commence appropriate actions under § 113 of the Clean Air Act, directing the Army, the TVA, and the AEC facilities to comply with the provisions of Regulation AP–1, § 5 (1).[28] On cross-motions for summary

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which has an air pollution discharge should initiate immediate discussion, if it has not already been accomplished, with the respective states, regarding development of a compliance schedule as required by their implementation plan. This compliance schedule should include the standards or emission limitations which must be met, the abatement equipment to be constructed, corrective measures to be taken, and the timetable for taking these actions in order to meet established implementation plan deadlines. Your agency will be obligated under the compliance schedule to conduct monitoring and to keep operating records. Whenever a state makes a reasonable and specific request to review operating records, we recommend that your agency adopt an open-door policy by providing the requested data." App. 57–58.

[27] The suit was brought by the Attorney General without the concurrence of the Commission. The District Court's ruling that Kentucky law permitted the Attorney General to sue without a request from the Commission is not challenged here.

[28] Section 113, as added, 84 Stat. 1686, 42 U. S. C. § 1857c–8, empowers the EPA Administrator, upon finding that any person is in violation of an applicable provision of an implementation plan or that violations of an applicable implementation plan are so widespread as to appear to result from ineffective state enforcement and upon giving notice, to commence appropriate action either by issuing an order to any person requiring compliance with the plan's requirements or by bringing a civil action under § 113 (b) in district court. The District Court and the Court of Appeals both ruled that, even if federal facilities were obligated to secure operating permits, the Administrator's duty to proceed under § 113 was discretionary. The decision not to commence actions

judgment, the District Court ordered the complaint dismissed. *Kentucky ex rel. Hancock* v. *Ruckelshaus*, 362 F. Supp. 360 (1973).

The Court of Appeals affirmed, 497 F. 2d 1172 (CA6 1974). Like the District Court, 362 F. Supp., at 363 n. 3, the Court of Appeals found it unnecessary to determine whether the federal installations were in compliance with Kentucky's emission limitations or had adopted adequate compliance schedules, for it was Kentucky's position that notwithstanding possible compliance "the Kentucky Plan is so formulated that the State cannot meet its primary responsibility under the Clean Air Act without the use of permits." 497 F. 2d, at 1174–1175. After examining § 118 and its purposes in relation to other provisions of the Clean Air Act, the court concluded:

> "We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit requirements. Congress did commit the United States to compliance with air quality and emission standards, and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end." 497 F. 2d, at 1177.

We granted Kentucky's petition for certiorari, 420 U. S. 971 (1975), to resolve a conflict in the Courts of Appeals,[29] and now affirm.

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under § 113 was therefore unreviewable. 5 U. S. C. § 701 (a)(2); § 304 (a)(2) of the Clean Air Act, as added, 84 Stat. 1706, 42 U. S. C. § 1857h–2 (a)(2). Our disposition of the case makes it unnecessary to reach this alternative ground for judgment in favor of the EPA respondents.

[29] After the petition was filed, a divided panel of the Fifth Circuit concluded that § 118 does require federal facilities to secure a state operating permit and to comply with state "enforcement mecha-

III

It is a seminal principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 426 (1819). From this principle is deduced the corollary that

> "[i]t is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *Id.*, at 427.

The effect of this corollary, which derives from the Supremacy Clause [30] and is exemplified in the Plenary Powers Clause [31] giving Congress exclusive legislative authority over federal enclaves purchased with the consent of a State, is "that the activities of the Federal Government are free from regulation by any state." [32] As Mr. Justice Holmes put it in *Johnson* v. *Maryland*, 254 U. S. 51, 57 (1920):

> "[T]he immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they

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nisms." *Alabama* v. *Seeber*, 502 F. 2d 1238 (1974), cert. pending, No. 74-851. See also *California* v. *Stastny*, 382 F. Supp. 222 (CD Cal. 1972).

[30] Art. VI, cl. 2.

[31] Art. I, § 8, cl. 17:

"[The Congress shall have Power to] exercise exclusive Legislat[ive] . . . Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

[32] *Mayo* v. *United States*, 319 U. S. 441, 445 (1943) (footnote omitted).

> desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them . . . ."

Taken with the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign" [33] "without a clear expression or implication to that effect," [34] this immunity means that where "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation.[35] Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," [36] "specific congressional action" [37] that makes this authorization of state regulation "clear and unambiguous." [38]

Neither the Supremacy Clause nor the Plenary Powers Clause bars all state regulation which may touch the activities of the Federal Government. See *Penn Dairies*

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[33] *United States* v. *United Mine Workers,* 330 U. S. 258, 272 (1947) (footnote omitted). See *United States* v. *Herron,* 20 Wall. 251, 263 (1874); *United States* v. *Knight,* 14 Pet. 301, 315 (1840).

[34] *United States* v. *Wittek,* 337 U. S. 346, 359 (1949) (footnote omitted).

[35] *Mayo* v. *United States, supra,* at 447, 448 (footnote omitted).

[36] *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 122 (1954).

[37] *Paul* v. *United States,* 371 U. S. 245, 263 (1963).

[38] *California ex rel. State Water Resources Control Board* v. *EPA,* 511 F. 2d 963, 968 (CA9 1975), rev'd on other grounds, *post,* p. 200.

209-904 O - 78 - 15

v. *Pennsylvania Milk Control Comm'n,* 318 U. S. 261 (1943); *Alabama* v. *King & Boozer,* 314 U. S. 1, 9 (1941), and cases cited. "Here, however, the State places a prohibition on the Federal Government." [39] The permit requirement is not intended simply to regulate the amount of pollutants which the federal installations may discharge. Without a permit, an air contaminant source is forbidden to operate even if it is in compliance with every other state measure respecting air pollution control and abatement. It is clear from the record that prohibiting operation of the air contaminant sources for which the State seeks to require permits, App. 14–17, is tantamount to prohibiting operation of the federal installations on which they are located. *Id.,* at 89–93.

Kentucky, like the Court of Appeals for the Fifth Circuit in *Alabama* v. *Seeber,* 502 F. 2d 1238, 1247–1248 (1974), finds in § 118 a sufficient congressional authorization to the States, not only to establish the amount of pollutants a federal installation may discharge, but also to condition operation of federal installations on securing a state permit. We disagree because we are not convinced that Congress intended to subject federal agencies to state permits. We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit. Nor can congressional intention to submit federal activity to state control be implied from the claim that under Kentucky's EPA-approved implementation plan it is only through the permit system that compliance schedules and other

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[39] *California Pub. Util. Comm'n* v. *United States,* 355 U. S. 534, 544 (1958).

requirements may be administratively enforced against federal installations.

IV

The parties rightly agree that § 118 obligates federal installations to conform to state air pollution standards or limitations and compliance schedules.[40] With the enactment of the Amendments in 1970 came the end of the era in which it was enough for federal facilities to volunteer their cooperation with federal and state officials. In Kentucky's view that era has been replaced by one in which federal installations are not only required to limit their air pollutant emissions to the same extent as their nonfederal neighbors, but also, subject only to case-by-case Presidential exemption, to submit themselves completely to the state regime by which the necessary information to promulgate emission limitations and compliance schedules is gathered and by which collection of that information and enforcement of the emission limitations and compliance schedules are accomplished. Respondents (hereafter sometimes EPA) take the position that the Congress has not gone so far. While federal and nonfederal installations are governed by the same emission standards, standards which the States have the primary responsibility to develop, the EPA maintains that the authority to compel federal installations to provide necessary information to the States and to conform to state standards necessary to carry out the federal policy to control and regulate air pollution has not been extended to the States.

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[40] Title 40 CFR § 51.1 (p) (1975) defines "compliance schedule" as "the date or dates by which a source or category of sources is required to comply with specific emission limitations contained in an implementation plan and with any increments of progress toward such compliance." Basically a compliance schedule is a means by which a State phases in attainment with the ultimate emission limitations that must be achieved. See *Train*, 421 U. S., at 68–69.

Analysis must begin with § 118.[41] Although the language of this provision is notable for what it states in comparison with its predecessor,[42] it is also notable for what it does not state. It does not provide that federal installations "shall comply with *all* federal, state, interstate, and local requirements to the same extent as any other person." Nor does it state that federal installations "shall comply with *all* requirements of the applicable state implementation plan." Section 118 states only to what extent—the same as any person—federal installations must comply with applicable state requirements; it does not identify the applicable requirements. There is agreement that § 118 obligates existing federal installations to join nonfederal sources in abat-

[41] "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112 (c). No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption." 42 U. S. C. § 1857f.

[42] See 42 U. S. C. § 1857f (a) (1964 ed., Supp. V), *supra*, at 171.

ing air pollution, that comparable federal and nonfederal sources are expected to achieve the same levels of performance in abating air pollution, and that those levels of performance are set by the States. Given agreement that § 118 makes it the duty of federal facilities to comply with state-established air quality and emission standards, the question is, as the Fifth Circuit put it in another case, "whether Congress intended that the enforcement mechanisms of federally approved state implementation plans, in this case permit systems, would be" available to the States to enforce that duty. *Alabama* v. *Seeber,* 502 F. 2d, at 1247. In the case before us the Court of Appeals concluded that federal installations were obligated to comply with state substantive requirements, as opposed to state procedural requirements, 497 F. 2d, at 1177, but Kentucky rejects the distinction between procedural and substantive requirements, saying that whatever is required by a state implementation plan is a "requirement" under § 118.

The heart of the argument that the requirement that all air contaminant sources secure an operating permit is a "requirement respecting control and abatement of air pollution" is that Congress necessarily implied the power to enforce from the conceded authority to develop and set emission standards. Under Kentucky's EPA-approved implementation plan, the permit requirement "is the mechanism through which [it] is able to *compel* the production of data concerning air contaminant sources, including the ability to prescribe the monitoring techniques to be employed, and it is the only mechanism which allows [it] to develop and review a source's compliance schedule and *insure* that schedule is followed." [43] When a State is without administrative means of implementing and enforcing its standards

[43] Brief for Petitioner 21 (emphasis added).

against federal sources, a duty to comply with those standards is said to be utterly meaningless.[44]

The difficulty with this position is threefold. First, it assumes that only the States are empowered to enforce federal installations' compliance with the standards. Second, it assumes the Congress intended to grant the States such authority over the operation of federal installations. Third, it unduly disregards the substantial change in the responsibilities of federal air contaminant sources under § 118 in comparison with 42 U. S. C. § 1857f (a) (1964 ed., Supp. V), *supra*, at 171. Contrary to Kentucky's contention that Congress necessarily intended to subject federal facilities to the enforcement mechanisms of state implementation plans, our study of the Clean Air Act not only discloses no clear declaration or implication of congressional intention to submit federal installations to that degree of state regulation and control but also reveals significant indications that in preserving a State's "primary responsibility for assuring air quality within [its] entire geographic area" the Congress did not intend to extend that responsibility by subjecting federal installations to such authority.

The Clean Air Act, as amended, does not expressly provide for a permit system as part of a State's implementation plan.[45] It is true that virtually every State

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[44] *Id.*, at 30. Several States which have filed briefs as *amici curiae* join Kentucky in recognizing that the issue is whether a State may enforce its emission limitations against a federal installation. See Brief for Alabama as *Amicus Curiae* 4, 5, 37–38; Brief for California as *Amicus Curiae* 9.

[45] Although use of a permit system may have been "encouraged" by the EPA as its "preferred approach," see *Train*, 421 U. S., at 68–69, the EPA has never made a permit system to control emissions from existing stationary sources a mandatory part of an implementation plan. The closest the EPA has come to this was a provision in a proposed rulemaking, 36 Fed. Reg. 6680, 6682 (1971), later eliminated, *id.*, at 15486, that might have been interpreted to

has adopted a form of permit system much like that adopted by Kentucky, see 40 CFR pt. 52 (1975), as a means of gathering information to determine what emission standards to set and compliance schedules to approve and of assuring compliance with them. Also, only an implementation plan enabling a State to meet these—and other—objectives can be approved by the EPA.[46] Nonetheless we find in the 1970 Amendments several firm indications that the Congress intended to treat emission standards and compliance schedules—those requirements which when met work the actual reduction of air pollutant discharge—differently from administrative and en-

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mean that an implementation plan must include a system requiring permits for the construction and operation of modifications to existing sources that would be modified before the Administrator promulgated proposed standards of performance for new sources under § 111 of the Clean Air Act. Compare 42 U. S. C. §§ 1857c–6 (a)(2), (b), with 36 Fed. Reg. 6682 (1971), proposing 42 CFR § 420.11 (a)(4).

[46] Among the eight conditions, §§ 110 (a)(2)(A)–(H), each implementation plan must meet are:

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of . . . primary or secondary standard[s], including, but not limited to, land-use and transportation controls; [and]

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator . . . ."

forcement methods and devices—those provisions by which the States were to establish and enforce emission standards, compliance schedules, and the like. This is so in spite of the absence of any definition of the word "requirements" or of the phrase "requirements respecting control and abatement of air pollution." [47]

[47] The phrase "requirement respecting control or abatement of air pollution" also appears in § 116 of the Clean Air Act, as added, 84 Stat. 1689, 42 U. S. C. § 1857d–1. That section provides that, with certain exceptions pre-empting state regulation of moving sources,

"nothing in this Act shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants *or* (2) any *requirement respecting control or abatement of air pollution;* except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State . . . may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section." (Emphasis added.)

Although the meaning of the italicized phrase in this section, which was added by the Conference Committee, see H. R. Conf. Rep. No. 91–1783, p. 48 (1970), 1 Leg. Hist. 198, is not entirely clear, it seems plain that as employed in § 116 the phrase is not synonymous with "emission standards and limitations." As the Fifth Circuit observed in *Alabama* v. *Seeber*, 502 F. 2d, at 1245, the use of "'or' in § 116 is clearly disjunctive." Yet it is agreed that, as used in § 118, the phrase does embrace such standards and limitations; indeed the EPA argues the two are synonymous.

It is suggested by an *amicus* that it is logical to read § 116 to mean that a "'standard or limitation respecting emissions of air pollutants' is a subcategory of the broader class of 'requirement[s] respecting control or abatement of air pollution.'" Brief for Alabama as *Amicus Curiae* 20. To the contrary, from § 116 it appears more logical to conclude that "standards" and "requirements" are separate categories which, together, compose all measures which a State is not denied the right to adopt or enforce.

Unlike Kentucky and the Fifth Circuit, *Alabama* v. *Seeber*, *supra*, at 1245–1246, which conclude that use of the phrase in § 116 elucidates its scope and meaning in § 118, we are unable

In § 110 (e)(1)(A), for example, the EPA is authorized to extend for two years a State's three-year deadline for attaining a national primary air quality standard if, upon timely application, it is determined that an emission source is unable to meet "the requirements of such plan which implement such primary standard because the necessary technology" is unavailable. 42 U. S. C. § 1857c–5 (e)(1)(A). Although compiling the information necessary for a permit may require familiarity with technology, it is plain that the "requirements" to which this section refers are those for which technologically adequate industrial processes might not be available. Section 110 (e)(2)(A) necessarily contemplates the same meaning of "requirements," that is, emission standards and compliance schedules, as does § 110 (f) which provides for one-year postponement of the application of "requirements" to sources the continued operation of which is "essential to national security or to the public health." 42 U. S. C. § 1857c–5 (f)(1)(D). See *Train*, 421 U. S., at 80–84.[48]

Stronger indications that the term "requirements" as used in § 118 does not embrace every measure incorporated in a State's implementation limitations and com-

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to draw from § 116 any support for the position that Congress affirmatively declared that federal installations must secure state permits. To reaffirm, as does § 116, a State's inherent right as a general matter to employ permits in the exercise of its police power in the area of air pollution control may mean that the Federal Government has not pre-empted the area from state regulation, but does not constitute the kind of clear and unambiguous authorization necessary to subject federal installations and activities to state enforcement.

[48] Provision in § 118 for Presidential exemption on a case-by-case basis and in the "paramount interest of the United States" from compliance with emission standards or compliance schedules does not clearly imply that federal installations are otherwise subject to the enforcement mechanisms of a state implementation plan.

pliance schedules appear in the emergence of § 118 from the House bill and Senate amendment from which it was derived.

The House bill provided that federal installations "shall comply with applicable Federal, State, interstate, and local *emission standards.*" [49] The House Report stated that this "legislation directs Federal agencies in the executive, legislative, and judicial branches to comply with applicable Federal, State, interstate, and local *emission standards.*" [50] The Senate amendment provided that federal agencies "shall provide leadership in carrying out the policy and purposes of this Act and shall comply with the *requirements* of this Act in the same manner as any person . . . ." [51] The Senate Report stated that this provision "requires that Federal facilities meet the *emission standards* necessary to achieve ambient air quality standards as well as those established in other sections of Title I." [52]

Thus while the House bill spoke of "emission standards," the Senate amendment, like § 118 as enacted, spoke of "requirements." In accommodating the different language in the two bills and formulating what is now § 118, the Conference Committee simply combined the House and Senate provisions. If, as Kentucky ar-

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[49] H. R. 17255, 91st Cong., 2d Sess., § 10 (§ 111) (1970), 2 Leg. Hist. 938 (emphasis added).

[50] H. R. Rep. No. 91–1146, *supra,* n. 11, at 4, 2 Leg. Hist. 894 (emphasis added).

[51] S. 4358, 91st Cong., 2d Sess., § 7 (§ 118 (a)) (1970), 1 Leg. Hist. 573 (emphasis added).

[52] S. Rep. No. 91–1196, *supra,* n. 12, at 23, 1 Leg. Hist. 423 (emphasis added). Throughout the Senate amendment and in the Report the terms "requirements," "emission requirements," and "emission standards" were used interchangeably. Compare proposed § 118 (a) ("requirements") and the Report ("emission standards") with proposed § 111 (a) (2) (D) ("emission requirements"), 1 Leg. Hist. 545.

gues, the Conference Committee in taking the Senate language of "requirements" meant thereby to subject federal facilities to enforcement measures obviously not embraced in the language of the House bill, it is remarkable that it made no reference to its having reconciled this difference in favor of extending state regulation over federal installations. Given the interchangeable use of "emission standards" and "emission requirements" in the Senate amendment, see n. 52, *supra*, the predominance of the language of the Senate version in § 118 as enacted,[53] and the absence of any mention of disagreement between the two bills, it is more probable that the Conference Committee intended only that federal installations comply with emission standards and compliance schedules than that its intention was to empower a State to require federal installations to comply with every measure in its implementation plan. See *Alabama* v. *Seeber*, 502 F. 2d, at 1247.

The impression that Congress intended only that federal agencies comply with emission limitations and standards is strengthened by the Conference Report, which stated in full:

> "The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions.
>
> "The conference substitute modifies the House

[53] For example, only the Senate amendment equated the federal installation's duty to comply with "requirements" to any person's duty, a feature of § 118 as enacted. Similarly, only the Senate amendment, in § 118 (b) (1 Leg. Hist. 574), provided that a State might sue in federal court to enforce the provisions of § 118 (a). H. R. Conf. Rep. No. 91–1783, *supra*, at 55, 1 Leg. Hist. 205. That provision was incorporated in the Amendments in § 304 (a), through the definition of "person" retained in § 302 (e), as added, 77 Stat. 400, 42 U. S. C. § 1857h (e).

provision to require that the President rather than the Administrator be responsible for assuring compliance by Federal agencies." [54]

This examination of § 118 and the central phrase "requirements respecting control or abatement of air pollution," discloses a regime of divided responsibility for the mobilization of federal installations in the effort to abate air pollution. Kentucky agrees but persists in its contention that *existing* federal sources have been subjected to state regulation by differing on where that division places authority to enforce compliance by existing federal facilities—" 'sources with respect to which state implementation plans establish the criteria for enforcement.' " [55] For such—existing—sources, Kentucky maintains, the States are granted primary enforcement authority while " 'the responsibility and authority for

[54] H. R. Conf. Rep. 91–1783, *supra*, at 48, 1 Leg. Hist. 198. We are not persuaded by the argument that reference to the President's replacing the EPA Administrator as the one "responsible for assuring compliance by Federal agencies" only implicates the President's power to "exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with . . . a requirement." 42 U. S. C. § 1857f. Both the House and Senate Reports referred quite plainly to the power to exempt and to make exceptions when referring to the President's (or the Administrator's) power to act in the paramount interest of the United States on a case-by-case basis. S. Rep. No. 91–1196, *supra*, at 23, 1 Leg. Hist. 423; H. R. Rep. No. 91–1146, *supra*, at 15, 2 Leg. Hist. 905. Thus, reference in the Conference Report to the President's authority to assure compliance merely expresses what is implied by the very grant of authority to exempt some federal sources—the authority, as to those installations subject to Presidential control, to enforce in the first instance the new regimen of federal compliance with primarily state formulated and administered implementation plans rests in the Federal Government, not in the States.

[55] Brief for Petitioner 33, quoting *Alabama* v. *Seeber*, 502 F. 2d, at 1244.

enforcement . . . is granted to EPA in those instances (*i. e.*, new sources and hazardous pollutants) where EPA establishes the criteria.' " [56] Perhaps we could agree if the issue were not whether there is a clear and unambiguous congressional authorization for the regulatory authority petitioner seeks, for as the Fifth Circuit has said, such a "scheme is a reasonable one." *Alabama* v. *Seeber, supra,* at 1244. But that is the issue, and the implications Kentucky draws from its evaluation of the manner in which the Congress divided responsibility for regulation of new sources and of hazardous air pollutants do not persuade us.

In drawing on the manner in which the Clean Air Act has divided the authority to regulate new sources of air pollutants [57] and the emission of hazardous air pollutants [58] in comparison with existing air pollutant sources, Kentucky makes two separate though related arguments. The first is that when Congress wanted to exempt federal facilities from compliance with a state requirement, it did so by express exclusionary language. Thus § 111 (c)(1) authorizes the Administrator to delegate to a State "any authority he has under this Act to implement and enforce" new-source standards of performance—with which new sources owned or operated by the United States must comply (§ 111 (b)(4))—"except with respect to new sources owned or operated by the United States." 42 U. S. C. § 1857c–6 (c)(1). Section 114 (b)(1) of the Clean Air Act, as added, 84 Stat. 1688, is to the same

[56] *Ibid.*

[57] Regulation of "new sources" of air pollutants, by EPA-promulgated "standards of performance" (see *infra,* n. 59), is provided for in § 111 of the Clean Air Act, as added, 84 Stat. 1683, 42 U. S. C. § 1857c–6.

[58] Regulation of "hazardous air pollutants" is provided for in § 112 of the Clean Air Act, as added, 84 Stat. 1685, 42 U. S. C. § 1857c–7.

effect respecting inspections, monitoring, and entry of an emission source. 42 U. S. C. § 1857c–9 (b)(1). Similarly, § 112 (d)(1) authorizes the Administrator, upon finding that a State's plan to enforce emission standards for hazardous pollutants is adequate to the task, to delegate to that State "any authority he has under this Act to implement and enforce such standards (except with respect to stationary sources owned or operated by the United States)." 42 U. S. C. § 1857c–7 (d)(1). The argument that these specific exemptions of federal facilities from state enforcement and implementation methods are necessary only because § 118 has, as a general matter, subjected federal installations to all state requirements fails on several counts. First, as we have demonstrated, by itself § 118 does not have the effect petitioner claims. Second, the relevant portions of §§ 111, 112, and 114 assume that the Administrator possesses the authority to enforce and implement the respective requirements against sources owned or operated by the United States. See §§ 111 (c)(2), 112 (d)(2), and 114 (b)(2). Third, just as in providing for Presidential exemptions in § 118 Congress separated the requirements of §§ 111 and 112 from other requirements, Congress naturally treated the submission of federal installations to state regulation under §§ 111, 112, and 114 separately from general provisions for meeting ambient air quality standards under § 110 implementation plans devised by the States and approved by the EPA. A State must promulgate an implementation plan. § 110 (a). The delegation provisions of §§ 111, 112, and 114, on the other hand, are permissive, providing that "[e]ach State *may* develop and submit to the Administrator a procedure" to carry out the section. (Emphasis added.)

Kentucky's second argument is that the manner in which Congress differentiated treatment of new sources

and existing sources in §§ 111 and 114 clearly implies that existing federal sources were to be subject to the enforcement provisions of a State's implementation plan. The implication is said to arise from the different nature of the control required for the two types of installations. The difference is explained as follows: For existing sources the first step for a State is to determine the general quality of air in the relevant air quality region and then to compute the amounts of pollution attributable to each source. Next, appropriate emission standards necessary to meet the national ambient air quality standards must be assigned to the various sources, followed by determining the compliance schedule by which each installation will achieve the assigned standards by the attainment date prescribed in the Act. To carry out this process of gathering information and coordinating control throughout the State, it is said to be necessary for the States to have ready administrative authority over all sources, federal and nonfederal. This administrative authority, concededly a major part of an implementation plan as to nonfederal sources, must therefore have been intended to extend to federal sources as well.

In contrast, controlling "new sources" is described as a straightforward task. This is because "standards of performance" for such sources, which are established in light of technologically feasible emission controls and not in relation to ambient air quality standards [59] are set by the EPA for various categories of sources and are uniform throughout the Nation. A comprehensive enforcement

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[59] Section 111 (a)(1) defines a "standard of performance" to be "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U. S. C. § 1857c–6 (a)(1).

mechanism to develop and coordinate application of these standards is unnecessary, especially because all new sources must be in compliance before operation begins, § 111 (e). The Congress is said, therefore, to have exempted new federal installations from state enforcement of federally promulgated standards of performance because it was unnecessary to submit those installations to the same kind of coordinated control to which existing sources had been submitted.

The Act itself belies this contention. It recognizes that a "new source," even one in full compliance with applicable standards of performance, may hinder or prevent attainment or maintenance of air quality standards within the air quality region in which it is located, and requires a state implementation plan to include procedures for averting such problems. See §§ 110 (a)(2)(D), (a)(4).

The arguments respecting the federal new-source exception in § 114 also fail to bear the weight they must carry if Kentucky is to prevail. Section 114 provides for the establishment of various means by which to collect information

> "[f]or the purpose (i) of developing or assisting in the development of any implementation plan under section 110 or 111 (d), any standard of performance under section 111, or any emission standard under section 112, [or] (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan . . . ." 84 Stat. 1687, as added, 42 U. S. C. § 1857c–9 (a).

Unlike §§ 111 and 112, § 114 is doubly permissive. First, although the Administrator "shall" publish § 111 new-source standards of performance and § 112 hazardous air-pollutant-emission standards, under § 114 (a) the Administrator "may," but need not, require operators

of emission sources to keep records, to make reports, to install, use, and maintain monitoring equipment, and to sample its emissions. Second, as with §§ 111 and 112, the States "may" develop procedures to carry out the section. That Congress provided for this slight possibility that existing federal sources would be obliged to conform to state procedures for carrying out § 114 in addition to emission standards and compliance schedules scarcely implies, as petitioner suggests, that Congress intended existing federal sources to comply with *all* state regulatory measures, not only emission standards and compliance schedules. Rather than *exempting* new federal sources from an obligation to which they would otherwise have been subject, Congress may as well have been *extending* the obligation to conform to state § 114 regulatory procedures to existing—but not to new—federal sources which would not otherwise have been thought subject to such regulation.

Finally, we reject the argument that § 304 of the Clean Air Act, reveals congressional intention to grant the States authority to subject existing federal sources to the enforcement mechanisms of their enforcement plan. The section provides in part:

> "(a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—
>
> "(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . ." 42 U. S. C. § 1857h–2.

209-904 O - 78 - 16

Section 302 (e) includes a "State" in the definition of a "person," 42 U. S. C. § 1857h (e), and § 304 (f) provides:

> "For purposes of this section, the term 'emission standard or limitation under this Act' means—(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard . . . which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan." 42 U. S. C. § 1857h–2 (f).

Although it is argued that § 304 was not intended to permit a State to sue violators under the Act, we agree with the EPA that § 304 is the only means provided by the Act for the States to remedy noncompliance by federal facilities with § 118. That § 304 was so intended is plain from both the language of § 304(f) and the legislative origins of § 304. The Senate version of § 118 provided that a State "in which any Federal property, facility, or activity is located may seek to enforce the provisions of this section pursuant to section 304 of this Act." [60] When the Conference Committee eliminated this subsection from the Senate amendment, it retained the definition of "person," which included a "State" in § 302 (e), and added § 304 (f) with the parenthetical phrase "including a requirement applicable by reason of section 118." This made clear that § 118 was to be enforced through § 304, and § 304 is the only provision in the Act for state enforcement of the duties of a federal installation under § 118. In short, § 118 establishes the duty of federal installations to comply with state "requirements," and § 304 provides the means of enforcing that duty in federal court. In light of this

[60] S. 4358, § 7 (§ 118 (b)), 1 Leg. Hist. 574. See n. 53, *supra*.

close relationship between the two sections, we find it significant that § 304 (f) extends the enforcement power only to "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard," and not to all state implementation measures. Thus circumscribed, the scope of the § 304 power to enforce § 118 strongly suggests that § 118 duties themselves are similarly limited, for it seems most unlikely that in providing that a State might bring suit in district court to enforce the duties of federal installations under § 118, the Congress would not make all of those duties enforceable in district court. Yet this is exactly what Kentucky argues, saying: "There can be no explanation for the existence of Section 118 if it imposes no obligations other than those imposed under Section 304." [61]

The argument is defective on another count. Even if, standing alone, § 304 could be read to require federal facilities to comply with the matters within § 304 (f), the assumption that the two sections independently impose duties on federal installations conflicts with the legislative history. Section 304 (a) was first extended to apply to federal sources of pollution in Conference, at the same point at which the express provision for enforcement authority over federal installations was removed from § 118.[62] Given this relationship between

[61] Reply Brief for Petitioner 15–16.

[62] The House bill included no provision for suit in federal court. H. R. Conf. Rep. No. 91–1783, *supra*, at 55, 1 Leg. Hist. 205. The Senate amendment did provide for suit in district court "to require the enforcement of, the provisions of this Act including any applicable schedule or timetable of compliance, emission requirement, standard of performance, emission standard, or prohibition established pursuant to this Act . . . against any person, including, but not limited to, a governmental instrumentality or agency . . . ." S. 4358, § 9 (§ 304 (a)(1)), 1 Leg. Hist. 704. Because the

the two measures, we cannot credit the argument that § 118 was intended to impose on federal installations any broader duty to comply with state implementation measures than specified in § 304. The absence in § 304 of any express provision for enforcing state permit requirements in federal court is therefore too substantial an indication that congressional understanding was that the "requirements" federal facilities are obliged to meet under § 118 did not include permit requirements to be overcome by assertions to the contrary.

V

In view of the undoubted congressional awareness of the requirement of clear language to bind the United States,[63] our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest.[64] Absent such amendment, we can only conclude that to the extent it considered the matter in enacting § 118 Congress has fashioned a compromise which, while requiring federal installations to abate their pollution to the same extent as any other air contaminant source and under standards which the States have pre-

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Senate amendment retained previously enacted § 302 (e) of the Clean Air Act, see n. 53, *supra*, defining "person" as "an individual, corporation, partnership, association, State, municipality, and political subdivision of a State," it is clear, as the Senate Report confirms, that in the Senate amendment it was only by virtue of § 118 that a State could sue a federal facility for enforcement in district court under § 304. S. Rep. No. 91–1196, *supra*, at 37, 1 Leg. Hist. 437.

[63] See *United States* v. *United Mine Workers*, 330 U. S., at 273.

[64] The Senate Committee on Public Works has recently reported such legislation. See S. Rep. No. 94–717 (1976).

scribed, stopped short of subjecting federal installations to state control.

This conclusion does not mean that we are persuaded that the States are as able to administer their implementation plans as they would be if they possessed the degree of authority over federal installations urged here, although, as Kentucky acknowledged at oral argument, the EPA, acting under the impetus of Executive Order No. 11752, 3 CFR 380 (1974), has promulgated guidelines for compliance by federal agencies with stationary source air pollution standards, 40 Fed. Reg. 20664 (1975), which will lead to federal agencies' entering "consent agreements which are exactly identical in every respect to what a compliance schedule would have been." [65]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST dissent. They agree substantially with the reasoning of the Court of Appeals for the Fifth Circuit in *Alabama* v. *Seeber,* 502 F. 2d 1238, and they would reverse the judgment before us on the grounds set out in that opinion.

[65] Tr. of Oral Arg. 22.

ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–1435. Argued January 13, 1976—Decided June 7, 1976

While federal installations discharging water pollutants are obliged, under § 313 of the Federal Water Pollution Control Act Amendments of 1972 (Amendments), to comply to the same extent as nonfederal facilities with state "requirements respecting control and abatement of pollution," obtaining a permit from a State with a federally approved permit program is not among such requirements. Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous, *Hancock* v. *Train*, *ante*, p. 167, and here the Amendments do not subject federal facilities to state permit requirements with the requisite degree of clarity. Pp. 211–228.

511 F. 2d 963, reversed.

WHITE, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 228.

Deputy Solicitor General Friedman argued the cause for petitioners. On the brief were *Solicitor General Bork*, *Assistant Attorney General Johnson*, *Deputy Solicitor General Randolph*, *Edmund B. Clark*, *Raymond N. Zagone*, and *Robert V. Zener*.

Roderick Walston, Deputy Attorney General, argued the cause for respondent State of California. With him on the brief were *Evelle J. Younger*, Attorney General, *Carl Boronkay*, Assistant Attorney General, and *Richard C. Jacobs*, Deputy Attorney General. *Slade Gorton*, Attorney General, argued the cause for respondents

State of Washington et al. With him on the brief were *Charles B. Roe, Jr.*, Senior Assistant Attorney General, and *Charles W. Lean*, Assistant Attorney General.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case which arises under the Federal Water Pollution Control Act Amendments of 1972 (Amendments), 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* (1970 ed., Supp. IV), is whether federal installations discharging water pollutants in a State with a federally approved permit program are to secure their permits from the State, or from the Environmental Protection

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*Briefs of *amici curiae* urging affirmance were filed by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg* and *Richard G. Berger*, Assistant Attorneys General, for the State of New York, joined by *Robert L. Shevin*, Attorney General of Florida, *Warren Spannaus*, Attorney General of Minnesota, *Peter W. Sipkins*, Solicitor General, and *Eldon G. Kaul*, Assistant Attorney General, for the States of Florida and Minnesota; by *Ed W. Hancock*, Attorney General of Kentucky, and *David C. Short* and *David D. Beals*, Assistant Attorneys General, *Arthur K. Bolton*, Attorney General of Georgia, *Ronald Y. Amemiya*, Attorney General of Hawaii, and *William J. Brown*, Attorney General of Ohio, for the Commonwealths of Kentucky and Pennsylvania and the States of Georgia, Hawaii, and Ohio; by *Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, and *Stewart H. Freeman* and *Charles Alpert*, Assistant Attorneys General, for the State of Michigan; by *V. Frank Mendicino*, Attorney General, *Charles J. Carroll*, Deputy Attorney General, and *Marilyn S. Kite*, Special Assistant Attorney General, for the State of Wyoming; by *Francis B. Burch*, Attorney General, *Henry R. Lord*, Deputy Attorney General, and *Warren K. Rich*, Assistant Attorney General, for the State of Maryland; and by *John L. Hill*, Attorney General of Texas, *David M. Kendall*, First Assistant Attorney General, *Douglas G. Caroom*, Assistant Attorney General, and *Bronson C. LaFollette*, Attorney General of Wisconsin, for the States of Texas and Wisconsin.

Agency (EPA). As with the related Clean Air Act issue decided this day in *Hancock* v. *Train, ante,* p. 167, decision of the specific statutory question—whether obtaining a state permit is among those "requirements respecting control and abatement of pollution" with which federal facilities must comply under § 313 of the Amendments [1]—is informed by constitutional principles governing submission of federal installations to state regulatory authority.

I

Before it was amended in 1972, the Federal Water Pollution Control Act [2] employed ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism in its program for the control of water pollution.[3] This program based on water quality standards, which were to serve both to guide performance by polluters and to trigger legal action to abate pollution, proved ineffective. The problems stemmed from the character of the standards themselves, which focused on the tolerable effects rather than the preventable causes of water pollution, from the awkwardly shared federal and state responsibility for promulgating such standards,[4] and from the cumbrous enforcement procedures. These combined to make it very difficult to develop and

[1] 33 U. S. C. § 1323 (1970 ed., Supp. IV).

[2] The Act was first passed in 1948, Act of June 30, 1948, 62 Stat. 1155, and has been frequently revised. See annotation following 33 U. S. C. § 1251 (1970 ed., Supp. IV). Before the 1972 Amendments the Act was codified at 33 U. S. C. § 1151 *et seq.*

[3] 79 Stat. 907, as amended, 33 U. S. C. § 1160 (c).

[4] The States were to promulgate water quality standards and an implementation plan meeting certain criteria. 33 U. S. C. §§ 1160 (c)(1), (3). If a State did not establish such standards and a plan, the Administrator was charged to promulgate water quality standards—but not a plan—in cooperation with state officials. 33 U. S. C. §§ 1160 (c)(2), (4).

enforce standards to govern the conduct of individual polluters.

Some States developed water quality standards and plans to implement and enforce them, and some relied on discharge permit systems for enforcement. Others did not, and to strengthen the abatement system federal officials revived the Refuse Act of 1899, § 13, 30 Stat. 1152, 33 U. S. C. § 407, which prohibits the discharge of any matter into the Nation's navigable waters except with a federal permit.[5] Although this direct approach to water pollution abatement proved helpful, it also was deficient in several respects: The goal of the discharge permit conditions was to achieve water quality standards rather than to require individual polluters to minimize effluent discharge, the permit program was applied only to industrial polluters, some dischargers were required to obtain both federal and state permits, and federal permit authority was shared by two federal agencies.[6]

In 1972, prompted by the conclusion of the Senate Committee on Public Works that "the Federal water pollution control program . . . has been inadequate in every vital aspect," [7] Congress enacted the Amendments, declaring "the national goal that the discharge of pollutants into the navagible waters be *eliminated* by 1985." [8]

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[5] See Exec. Order No. 11574, 3 CFR 986 (1966–1970 Comp.). See also 84 Stat. 108, 33 U. S. C. § 1171 (b).

[6] S. Rep. No. 92–414, p. 5 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1423 (1973) (hereafter Leg. Hist.).

[7] S. Rep. No. 92–414, *supra*, at 7, 2 Leg. Hist. 1425.

[8] § 101 (a)(1), 33 U. S. C. § 1251 (a)(1) (1970 ed., Supp. IV) (emphasis added). Previously the purpose of the Act had been "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution." 33 U. S. C. § 1151 (a).

For present purposes the Amendments introduced two major changes in the methods to set and enforce standards to abate and control water pollution. First, the Amendments are aimed at achieving maximum "effluent limitations" on "point sources," as well as achieving acceptable water quality standards. A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." [9] An "effluent limitation" in turn is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . including schedules of compliance." [10] Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based [11] effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water

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[9] § 502 (14), 33 U. S. C. § 1362 (14) (1970 ed., Supp. IV). The terms "pollutant" and "discharge of pollutant" are defined in §§ 502 (6), (12), 33 U. S. C. §§ 1362 (6), (12) (1970 ed., Supp. IV).

[10] § 502 (11), 33 U. S. C. § 1362 (11) (1970 ed., Supp. IV). Section 502 (17) defines a "schedule of compliance" to be "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U. S. C. § 1362 (17) (1970 ed., Supp. IV).

[11] Point sources other than publicly owned treatment works must achieve effluent limitations requiring application of the "best practicable control technology currently available" by July 1, 1977, and application of the "best available technology economically achievable" by July 1, 1983. §§ 301 (b)(1)(A), (2)(A), 33 U. S. C. §§ 1311 (b)(1)(A), (2)(A) (1970 ed., Supp. IV).

quality standards to which it and other polluters must collectively conform.[12]

Second, the Amendments establish the National Pollutant Discharge Elimination System (NPDES)[13] as a means of achieving and enforcing the effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms.[14] An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. §§ 309 and 505, 33 U. S. C. §§ 1319 and 1365 (1970 ed., Supp. IV). With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. § 402 (k), 33 U. S. C. § 1342 (k) (1970 ed., Supp. IV). In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments.

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[12] Water quality standards are retained as a supplementary basis for effluent limitations, however, so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels. See §§ 301 (e), 302, 303, 33 U. S. C. §§ 1311 (e), 1312, 1313 (1970 ed., Supp. IV).

[13] § 402, 33 U. S. C. § 1342 (1970 ed., Supp. IV).

[14] Section 301 (a), 33 U. S. C. § 1311 (a) (1970 ed., Supp. IV), makes unlawful "the discharge of any pollutant by any person" except in compliance with numerous provisions of the Amendments, including § 402 which establishes the NPDES.

In effect, the NPDES terminates operation of the Refuse Act permit program. §§ 402 (a)(4), (5), 402 (k), 33 U. S. C. §§ 1342 (a)(4), (5), 1342 (k) (1970 ed., Supp. IV).

NPDES permits are secured, in the first instance, from the EPA, which issues permits under the authority of § 402 (a)(1), 33 U. S. C. § 1342 (a)(1) (1970 ed., Supp. IV). Section 402 (a)(3) requires the EPA permit program and permits to conform to the "terms, conditions, and requirements" of § 402 (b).[15] Consonant

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[15] 33 U. S. C. § 1342 (a)(3) (1970 ed., Supp. IV). Section 402 (b) provides:

"At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of

with its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent,

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which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204 (b), 307, and 308." 86 Stat. 880, 33 U. S. C. § 1342 (b) (1970 ed., Supp. IV).

See also § 303 (e), 33 U. S. C. § 1313 (e) (1970 ed., Supp. IV).

reduce, and eliminate pollution," [16] Congress also provided that a State may issue NPDES permits "for discharges into navigable waters within its jurisdiction," but only upon EPA approval of the State's proposal to administer its own program. The EPA may require modification or revision of a submitted program but when a plan is in compliance with the EPA's guidelines under § 304 (h)(2), 33 U. S. C. § 1314 (h)(2) (1970 ed., Supp. IV), and is supported by adequate authority to achieve the ends of §§ 402 (b)(1)–(9), n. 15, *supra*, and to administer the described program, the EPA shall approve the program and "suspend the issuance of permits under [§ 402 (a)] as to those navigable waters subject to such program." [17]

The EPA retains authority to review operation of a State's permit program. Unless the EPA waives review for particular classes of point sources or for a particular permit application, §§ 402 (d)(3), (e), 33 U. S. C. §§ 1342 (d)(3), (e) (1970 ed., Supp. IV), a State is to forward a copy of each permit application to the EPA for review, and no permit may issue if the EPA objects that issuance of the permit would be "outside the guidelines and requirements" of the Amendments. §§ 402 (d)(1), (2), 33 U. S. C. §§ 1342(d)(1), (2) (1970 ed., Supp. IV). In addition to this review authority, after notice and opportunity to take action, the EPA may withdraw approval of a state permit program which is not being administered in compliance with § 402. § 402 (c)(3), 33 U. S. C. § 1342 (c)(3) (1970 ed., Supp. IV).

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[16] § 101 (b), 33 U. S. C. § 1251 (b) (1970 ed., Supp. IV).

[17] § 402 (c)(1), 33 U. S. C. § 1342 (c)(1) (1970 ed., Supp. IV). Title 40 CFR § 124.2 (b) (1975) provides that upon approving a state permit program EPA "shall suspend [its] issuance of NPDES permits as to those point sources subject to such approved program."

The Amendments also sought to enlist "every Federal agency . . . to provide national leadership in the control of water pollution in [its] operations." [18] To do so, 33 U. S. C. § 1171 (a), which required federal agencies, "consistent with the paramount interest of the United States as determined by the President [to] insure compliance with applicable water quality standards," was amended by adding § 313,[19] providing that federal installations must "comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements." 33 U. S. C. § 1323 (1970 ed., Supp. IV).

II

On May 14, 1973, the Acting EPA Administrator approved the State of California's request to administer its own NPDES permit program and, effective that date, suspended EPA issuance of all permits for "all discharges in the State of California, other than those from agencies and instrumentalities of the Federal government." App. 18. Soon after this first approval of a state program and after correspondence exchanging views on a State's authority to issue permits to federal installations, the EPA informed the State of Washington that it "does not have the prerogative to delegate permit issuance for Federal facilities to any state." *Id.*, at 6. Shortly

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[18] S. Rep. No. 92–414, *supra*, at 67, 2 Leg. Hist. 1485. See H. R. Rep. No. 92–911, pp. 118–119 (1972), 1 Leg. Hist. 805–806.

[19] In 1970, 84 Stat. 107, 33 U. S. C. § 1171 (a), itself had amended the original measure, 70 Stat. 506, as amended, which had admonished federal agencies, "insofar as practicable and consistent with the interests of the United States and within any available appropriations, [to] cooperate" with federal and state officials "in preventing or controlling" water pollution. 33 U. S. C. § 466h (1964 ed., Supp. V). Cf. 42 U. S. C. § 1857f (a) (1964 ed., Supp. V) (Clean Air Act).

thereafter the State of Washington's permit program was rejected as "missing important components," *id.*, at 7, the EPA reaffirming its position that it had "sole authority to issue permits to federal facilities." *Id.*, at 25.

California and Washington filed petitions for review under § 509 (b)(1), which authorizes a court of appeals to review "the Administrator's action . . . (D) in making any determination as to a State permit program submitted under section 402 (b)." [20] The two States argued that § 313 authorized States with approved NPDES permit programs to require federal dischargers to obtain state permits. The States also argued that § 402 gave the EPA no authority to suspend operation of its permit program in a State only for nonfederal dischargers. The Court of Appeals agreed. Mindful of "strong structural and terminological similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments" and of the division in the Courts of

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[20] 33 U. S. C. § 1369 (b)(1)(D) (1970 ed., Supp. IV). The California petition challenged "the failure of the Administrator to approve the California permit program . . . insofar as it applies to agencies and instrumentalities of the Federal government." App. 16. Washington's petition for review challenged the EPA's refusal to consider for approval that portion of its submitted program which "included a provision that discharges of pollutants to navigable waters from federal facilities were covered by the state program." *Id.*, at 25.

Washington's resubmitted permit program was approved after its petition for review was filed, the EPA suspending issuance of EPA permits for "all discharges in the State of Washington other than those from agencies and instrumentalities of the Federal Government." *Id.*, at 29. Washington then filed an additional petition for review in the Court of Appeals. *Id.*, at 32.

The Court of Appeals rejected the EPA's claim that § 509 (b)(1)(D) did not give the court jurisdiction to review the Administrator's actions. The EPA has not pursued that argument in this Court.

Appeals as to the meaning of § 118 of the Clean Air Act,[21] the court found in the Amendments several measures, which it thought had no counterpart in the Clean Air Act and which in its view indicated that federal dischargers were subject to state permit requirements. However the Clean Air Act issue might be resolved, the court concluded that those other indications in the Amendments were sufficiently clear to satisfy the appropriate constitutional conditions for subjecting federal installations to state regulation, and held that federal installations were required to secure state NPDES permits. 511 F. 2d 963, 973 (CA9 1975). We granted the EPA's petition for certiorari, 422 U. S. 1041 (1975), and now reverse the judgment of the Court of Appeals.

III

Our decision in this case is governed by the same fundamental principles applied today in *Hancock* v. *Train, ante,* at 179: Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous. As in *Hancock* v. *Train,* we must determine whether Congress has subjected federal installations to the degree of state control urged by the States. The only section of the Amendments expressly obliging federal installations to comply with general measures to abate water pollution [22] is § 313, which provides in part:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction

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[21] See *Hancock* v. *Train, ante,* at 177, and n. 29.

[22] Cf. §§ 306 (b)(3), (e), 307 (d), 33 U. S. C. §§ 1316 (b)(3), (e), 1317 (d) (1970 ed., Supp. IV).

209-904 O - 78 - 17

> over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall compiy with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." 86 Stat. 875, 33 U. S. C. § 1323 (1970 ed., Supp. IV).

Except for the reference to service charges, § 313 is virtually identical to § 118 of the Clean Air Act, 42 U. S. C. § 1857f.[23] Taken alone, § 313, like § 118 of the Clean Air Act, states only to what extent—the same as any person—federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state

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[23] Like § 118 of the Clean Air Act, see *Hancock* v. *Train*, *ante*, at 182 n. 41, § 313 goes on to authorize the President, upon a determination that it is "in the paramount interest of the United States to do so" and subject to several limitations, to exempt certain federal point sources from "compliance with any such a requirement." Any exemptions granted must be reported annually to the Congress. The President may grant no exemptions from the requirements of §§ 306 and 307 of the Amendments, 33 U. S. C. §§ 1316, 1317 (1970 ed., Supp. IV), which provide, respectively, for standards of performance regulating "new sources" of water pollution and for effluent standards regulating the discharge of "toxic pollutants" and the pretreatment of the discharges introduced into "treatment works," defined in § 212 (2)(A), 33 U. S. C. § 1292 (2)(A) (1970 ed., Supp. IV). Like § 118 of the Clean Air Act, § 313 allows exemptions for lack of appropriations only when the Congress has failed to make a specific appropriation requested as a part of the budgetary process. Cf. 33 U. S. C. § 466h (1964 ed., Supp. V), n. 19, *supra*.

NPDES permit is a "requirement respecting control and abatement of pollution." [24]

The EPA's position is that the Amendments make clear "only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pursuant to its E. P. A.-approved implementation plan," as incorporated in EPA-issued permits, not that they comply with "state regulations demanding that sources of discharges—including federal facilities—obtain discharge permits." [25] The States claim that this distinction "between permits and effluent 'limitations' . . . ignores the fact that the mechanism by which such 'limitations' are formulated and applied to individual dischargers is by the permit system established in section 402." [26] From this the States, recognizing that § 313 itself does not subject federal dischargers to their permit programs, derive their principal argument that a State's authority to subject federal installations to its EPA-approved permit program must be implied from the practical needs of administering an NPDES permit program, and that this implication is sufficiently clear to satisfy the governing constitutional standard. In their view, the EPA's agree-

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[24] The Court of Appeals appeared to recognize as much; for even after comparing § 313 with its predecessor, 33 U. S. C. § 1171 (a), which "had required only that federal agencies comply with 'applicable water quality standards,' without specifying whether compliance was limited to the substantive content of the 'standards' referred to, and without specifying whether those standards included state standards," the court also concluded that the enactment of § 313 in and of itself would not sustain an inference that federal installations were to secure state permits. 511 F. 2d 963, 967.

[25] Brief for Petitioners 17, 18.

[26] Brief for Respondent California 5.

ment that the States have authority to develop and set the substantive content of permits issued to federal dischargers is an empty concession; without being able to subject federal installations to its own NPDES program a State is without effective means to formulate and apply the conditions which the EPA must make part of the permit for each individual source.

Congress used virtually the same language in § 313 as in § 118 of the Clean Air Act; and our conclusion in *Hancock* v. *Train, ante,* p. 167, that the Clean Air Act is without clear indication that Congress intended federal installations emitting air pollutants to be subject to the permit program of a State's implementation plan makes it difficult for the States to establish that for similar purposes the same language becomes sufficiently clear in § 313 of the Amendments. There are, of course, significant differences between the Clean Air Act and the Amendments. Only the Amendments expressly provide for a permit program to aid in abating pollution. In comparison with the Clean Air Act, the Amendments give the EPA a more prominent role in relation to the States; a State is not required to develop an NPDES permit program, and until a State does develop a permit program *all* dischargers in the State are subject to a permit program developed and carried out by the EPA. In addition, under the Amendments the EPA's role in developing the effluent limitations that serve as the basis for a State's NPDES permit conditions [27] is more prominent than in developing the ambient air qual-

[27] The precise relation between "guidelines for effluent limitations" to be promulgated by the EPA under § 304 (b), 33 U. S. C. § 1314 (b) (1970 ed., Supp. IV), and the several degrees of § 301 effluent limitations which are to be achieved by 1977 and 1983, respectively, see n. 11, *supra,* is at issue in No. 75-978, *E. I. du Pont de Nemours & Co.* v. *Train,* cert. granted, 425 U. S. 933 (1976).

ity standards which are the foundation of the emission standards in a State's Clean Air Act implementation plan. In the aggregate, these differences tend to support the EPA's position and in any event they hardly require a conclusion contrary to *Hancock* v. *Train,* particularly since, in the Court of Appeals' words, "certain parts of the legislative history would seem to indicate that the 'requirements' language of Section 313 refers simply and solely to substantive" standards, to effluent limitations and standards and schedules of compliance. 511 F. 2d, at 969.[28]

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[28] In both the Senate bill, S. 2770, 92d Cong., 1st Sess. (1971), 2 Leg. Hist. 1676–1677, and the House amendment, as reported, H. R. 11896, 92d Cong., 2d Sess. (1972), 1 Leg. Hist. 1040–1041, § 313 provided that federal installations must "comply with Federal, State, interstate, and local requirements respecting control and abatement of [water] pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." (The House version, like § 313 as enacted, did not include the bracketed word.) In the Report accompanying S. 2770, § 313 was described as

"requir[ing] that Federal facilities meet the same *effluent limitations* as private sources of pollut[i]on, unless the Federal facility is specifically exempted by the President. . . . This section requires that Federal facilities meet all *control requirements* as if they were private citizens." S. Rep. No. 92–414, *supra,* at 67, 2 Leg. Hist. 1485 (emphasis added).

Later, in relating how § 313 provides that the President may exempt certain federal sources from "such requirements," the Report explained the requirements from which a federal facility may be exempted in terms of controlling its pollution, controlling actual physical discharge:

"The Committee recognizes, however, that it may be in the paramount interest of the United States that a plant or facility not achieve full water pollution control within the time required." S. Rep. No. 92–414, *supra,* at 68, 2 Leg. Hist. 1486.

The House Report also first described the "requirements" of § 313 as "effluent limitations":

"This section requires that Federal facilities meet the same efflu-

With these obstacles to the States' position in mind, we examine the reasons which collectively led the Court of Appeals to conclude and the States to contend that the Amendments clearly require federal installations to secure state NPDES permits. The Court of Appeals first concluded that such an implication appears in the final phrase of the first sentence of § 313—"including the payment of reasonable service charges." This language, it is argued, must refer to charges incident to a state permit program: If payment of such charges is a "requirement," it must be that Congress intended federal installations to secure state NPDES permits, for there would be no reason to order federal installations to pay fees for a permit which they are not required to obtain. However, the legislative history of § 313 casts no light on the meaning of this clause,[29] and it is not immedi-

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ent limitations, other limitations, performance standards, toxic effluent standards and thermal discharge regulations as private sources of pollution . . . ." H. R. Rep. No. 92–911, *supra*, at 118, 1 Leg. Hist. 805.

The absence of any reference to federal facilities' securing a state NPDES permit—respondent California agrees the "reports are silent with respect to the issues in this case" (Brief 40)—continues through the Conference Report which indicates that there were no differences to be resolved between the House and Senate versions of § 313. The Report summarized the Senate bill as "requir[ing] Federal facilities to meet the same effluent limitations as other sources of pollution" and the House amendment as requiring them "to meet the same requirements as private sources of pollution." S. Conf. Rep. No. 92–1236, p. 135 (1972), 1 Leg. Hist. 318.

[29] The Court of Appeals, 511 F. 2d, at 969–970, found the legislative history of § 313 silent on the meaning of the clause. The States' only support for their construction of the clause is the "recollection" of one of the members of the Senate Public Works Committee, expressed in September 1974, nearly two years after the Amendments were enacted and while this litigation was pending in the Court of Appeals, that the language was intended to authorize a federal agency to pay a fee to the State as a part of the

ately clear from the face of § 313 that the phrase does refer to application and service charges associated with an NPDES permit program. Indeed, the term "service charges" might as well be taken to refer to recurring charges for performing a service such as treating sewage, as to fees for accepting and processing a permit application. The EPA so reads the statute and it is not an unreasonable construction.[30] At the very least, the "service charges" language hardly satisfies the rule that federal agencies are subject to state regulation only when and to the extent Congress has clearly expressed such a purpose.

The Court of Appeals also found textual support for its conclusion in § 510 of the Amendments.[31] This

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requirement that it obtain a state discharge permit. Brief for Respondent California 24 n. 24; Brief for Respondent Washington 20 n. 15, both citing 120 Cong. Rec. 31216 (1974) (remarks of Sen. Baker).

[30] The EPA explains that the absence of such direction or clarification in the Clean Air Act supports its position, because there are no sewers to carry away air emissions and hence no comparable services for which to make clear that appropriate charges may be levied.

[31] "Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 86 Stat. 893, 33 U. S. C. § 1370 (1970 ed., Supp. IV).

section, which is patterned after § 116 of the Clean Air Act,[32] provides that the States may set more restrictive standards, limitations, and requirements than those imposed under the Amendments.[33] Section 510 quite plainly was intended to strengthen state authority. It may also have been intended to permit the States to impose stricter standards and effluent limitations on federal installations than would have been imposed under an EPA permit in the absence of an approved state NPDES program. But this hardly answers the question before us, which is whether these higher standards are to be enforced through a state rather than an EPA permit system. It is nevertheless argued that the meaning of the phrase "requirements respecting control and abatement of pollution" used in § 313 is informed by its use in § 510, an argument akin to one made and rejected in *Hancock* v. *Train*, *ante*, at 186–187, n. 47. We reject it here for much the same reasons: The phrase cannot have the same meaning in both sections, and there is scant reason to credit the States' position that treating "standards" and "requirements" disjunctively in § 510 somehow dictates that "requirements" in § 313 shall embrace more than "standards."

Another contention drawing upon § 510 is that a State's authority to impose stricter substantive standards on federal installations is meaningless if a State cannot subject federal dischargers to its permit system. This is simply an adjunct[34] to the States' primary argument

[32] 42 U. S. C. § 1857d–1, quoted in *Hancock* v. *Train*, *ante*, at 186–187, n. 47. The Court of Appeals was in error when it stated, 511 F. 2d, at 973, that § 510 had "no counterpart" in the Clean Air Act.

[33] S. Conf. Rep. No. 92–1236, *supra*, at 148, 1 Leg. Hist. 331. See S. Rep. No. 92–414, *supra*, at 85, 2 Leg. Hist. 1503; H. R. Rep. No. 92–911, *supra*, at 136, 1 Leg. Hist. 823.

[34] See n. 35, *infra*.

that no state NPDES permit system can function effectively unless federal dischargers are required to obtain state permits and that federal installations are therefore impliedly, but clearly subject to state permit programs. We cannot agree.

Before a State has its NPDES program approved, it is the EPA which issues permits for *all* dischargers, federal and nonfederal. Since the Amendments do not require the States to develop NPDES programs, we must assume that the Congress was satisfied that the EPA could administer the program, not only by promulgating the nationwide effluent limitations and other standards required by the Amendments, but also by translating those limitations into the conditions of individual permits for individual federal and nonfederal dischargers. We must also assume that the Congress contemplated that there may be some States, which would elect not to develop an NPDES program but would nonetheless determine—as § 510 permits—to adopt water quality standards or other limitations stricter than those the EPA itself had promulgated and would otherwise apply. This being the case, Congress must have contemplated that the EPA was capable of issuing permits in that State—to both federal and nonfederal dischargers—and of enforcing those stricter standards. Some of those standards—in fact all but those pegged to the quality of the receiving waters—could be translated into permit conditions for each discharger without coordinating the conditions in other permits, because the effluent limitations in the Amendments are technology based and the timetable by which compliance is to be achieved is not made to depend on the performance of other dischargers. Other standards, primarily those involving water quality standards, would require coordination among the permit conditions of numerous polluters—federal and nonfed-

eral, and it is evident that Congress contemplated that the EPA was capable of carrying out this function as well.

The presence of the EPA as a permit-issuing authority means that although federal dischargers are not securing state NPDES permits they are nevertheless being subjected to the administrative authority of a federal agency which is required to make a State's "more stringent limitation[s], including those necessary to meet water quality standards, treatment standards, or schedules of compliance" part of the conditions of the permits it must issue.[35] We recognize that there may be some problems of coordination between the EPA and the state pollution control agency in the implementation of state water quality standards. State officials may view the EPA implementation of a State's—or its own—water quality standards as placing a disproportionate share of the additional abatement effort on the nonfederal dischargers in the State, thereby obligating the State to impose undesirably restrictive effluent limitations on those nonfederal—predominantly private—dischargers. At the same time, Congress might have been apprehensive that

[35] Through § 402 (a)(2), § 402 (b)(1)(A) requires the Administrator to "prescribe conditions for . . . permits to assure compliance with the requirements" of § 301, just as it requires a state NPDES permit to include such conditions. See *supra*, at 206–208, and n. 15. Section 301 (b) provides in part:

"[T]here shall be achieved—

"(1) . . .

"(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (*under authority preserved by section 510*) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." 86 Stat. 844, 33 U. S. C. § 1311 (b)(1)(C) (1970 ed., Supp. IV) (emphasis added).

state regulatory officials, if in the position to do so, would impose a disproportionate share of the burden on federal dischargers. However that may be, we believe that these possible problems of coordination in the administration of water quality standards fail to provide an adequate basis for finding a clear congressional intention to subject federal dischargers to the degree of control inherent in adhering to state permit requirements respecting water quality standards.[36]

The States make several other arguments in support of their position that Congress intended federal dischargers to be subject to state NPDES permit programs, that "requirements" in § 313 include securing a state NPDES permit. We find none of them persuasive. They assert that since the EPA's authority to issue permits to federal dischargers stems at least in part from § 313, it is "capricious" to conclude that the word "requirements" in § 313 refers to permits issued by the EPA under § 402 (a), but not to permits issued by a State under § 402 (b). The answer to this argument is that the EPA's authority to issue permits to federal as well

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[36] Respondent California argues that the obligation of federal dischargers to meet state effluent limitations necessarily implies state power to subject them, in turn, to state schedules of compliance, state administrative hearings to determine those schedules of compliance, and therefore to the entire gantlet of state permit proceedings and finally to the permit itself. Brief 32–37. The defect in this argument is its opening assertion that federal dischargers must comply with a State's *individualized* effluent limitations, that is, permit conditions such as compliance schedules. We think that the EPA is correct that federal dischargers are to be governed only by the same general effluent limitations and other standards and compliance schedules as other polluters, as embodied in EPA permits, and that in issuing permits to federal dischargers the EPA is to treat federal dischargers under its NPDES program in the same way the State would treat nonfederal dischargers under its program.

as nonfederal dischargers is granted by § 402 (a), not § 313. Nor does the "requirement" that a federal discharger secure a permit stem from § 313; that also arises from § 402 (a) alone.[37]

The States, like the Court of Appeals, 511 F. 2d, at 973, also find support for their position in § 505 of the Amendments, 33 U. S. C. § 1365 (1970 ed., Supp. IV), which provides that a citizen may commence civil actions in district court "against any person (including . . . the United States . . .) who is alleged to be in violation of . . . an effluent standard or limitation under this Act . . . ." § 505 (a)(1), 33 U. S. C. § 1365 (a)(1) (1970 ed., Supp. IV). One of the definitions of "effluent standard or limitation" for purposes of § 505 is "a permit or condition thereof issued under section 402 of this Act, which is in effect under this

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[37] The authority to require permits rests on § 402 alone, not on § 301 (a); and it was under § 402 that the Administrator issued his regulation subjecting federal instrumentalities to the EPA permit system. 40 CFR §§ 125.2 (a)(2), (b) (1975), 38 Fed. Reg. 13528 (1973). Section 301 (a) simply makes it "unlawful" for "any person" not to have the required permit. That federal agencies, departments, and instrumentalities are not "persons" within the meaning of § 301 (a) and the Amendments, see § 502 (5), 33 U. S. C. § 1362 (5) (1970 ed., Supp. IV), does not mean either that federal dischargers are not required to secure NPDES permits, or that their obligation to secure an NPDES permit derives from a different provision of the Amendments. A federal discharger without a permit is no less out of compliance with § 402 than a nonfederal discharger; the federal discharge is however not "unlawful." Section 309 of the Amendments, 33 U. S. C. § 1319 (1970 ed., Supp. IV), which provides for federal enforcement of the Amendments, mirrors § 301 (a)'s differing treatment of federal and nonfederal sources. Section 309 (a)(3), for example, provides for the EPA to issue orders to "persons" in violation of, *inter alia*, § 301 and to bring a civil action under § 309 (b), 33 U. S. C. § 1319 (b) (1970 ed., Supp. IV). See also §§ 306 (e), 307 (d), 505 (f)(1), 33 U. S. C. §§ 1316 (e), 1317 (d), 1365 (f)(1) (1970 ed., Supp. IV).

Act (including a requirement applicable by reason of section 313 of this Act)." § 505 (f)(6), 33 U. S. C. § 1365 (f)(6) (1970 ed., Supp. IV). California reads § 505 (f) to equate a "requirement" under § 313 with a permit issued under § 402, as if § 505 (f)(6) were phrased: "any permit or condition thereof issued under Section 402 of this Act, which is in effect under this Act (including one issued to a federal discharger)." In a similar vein, Washington asserts that "[c]itizens may bring suit to enforce permits issued under Section 402," including "permits and conditions thereof applicable because of Section 313." Brief 18. It is more reasonable, however, to interpret "requirement" in the parenthetical expression in § 505 (f)(6) as referring principally to a "condition," not to a "permit." This is because of the Amendments' primary reliance on the NPDES as a means to abate and control water pollution. See *supra*, at 205. For enforcement purposes § 402 (k) deems a permit holder who is in compliance with the terms of its permit to be in compliance "with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health." 33 U. S. C. § 1342 (k) (1970 ed., Supp. IV). Thus, the principal means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit. Of the six subdivisions of § 505 (f) defining "effluent standard or limitation," only § 505 (f)(6) refers to any of the standards or limitations *as translated into the conditions of an NPDES permit*. Thus, while §§ 505 (f)(2)–(4) permit suits for violation of effluent standards or limitations promulgated under §§ 301, 302, 306, and 307, a suit against a permit holder will necessarily be brought under the definition in § 505 (f)(6); unless the plaintiff can show violation of the permit condition, violation of the Amendments cannot be established. This is true both

for conditions imposed in accordance with EPA–promulgated effluent limitations and standards and for those imposed in accordance with more stringent standards and limitations established by a State pursuant to § 510. The reference in § 505 (f)(6) to requirements applicable by reason of § 313 is to be read as making clear that *all* dischargers (including federal dischargers) may be sued to enforce permit conditions, whether those conditions arise from standards and limitations promulgated by the Administrator or from stricter standards established by the State.[38] In short, we cannot accept the States' position that the meaning of "requirements" in § 313 they urge is supported by its use in § 505 (f)(6).

Finally, it is argued that when a State submits a plan in conformity with § 402, the EPA must approve it and must then suspend the issuance of all EPA permits with respect to the waters covered by the plan, including permits to federal agencies.[39] Because it is inconceivable

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[38] The Court of Appeals read § 505 (f) as explicitly distinguishing between effluent standards and limitations and other types of limitations or standards, on the one hand, and a requirement applicable by reason of § 313 on the other. 511 F. 2d, at 972. In light of § 402 (k), which for purposes of § 505 makes compliance with a permit condition compliance with most of the sections imposing standards and limitations, § 505 (f)(6) is the central provision of § 505 (f) and, as outlined in the text, its salient feature is not distinguishing standards from requirements, but distinguishing standards and limitations, on the one hand, from the permit conditions embodying those standards on the other.

[39] The legislative history on the EPA's authority to suspend its permit program is meager, but Congress does not appear to have concentrated its attention on the question of partial suspension of the EPA permit program within a State. Thus, from § 402 (b), which permits a State to submit "a full and complete description of the program it proposes to establish and administer . . . under an interstate compact" (see § 103, 33 U. S. C. § 1253 (1970 ed., Supp. IV)), it is evident that Congress clearly contemplated that the EPA might suspend issuance of § 402 (a) permits only as to some of a

that Congress would have intended federal instrumentalities to operate without permits, it is contended that Congress anticipated the state permit system to apply.

State's navigable waters—those within the scope of the interstate compact—and continue to issue permits to federal and nonfederal dischargers on other waters within the State. Nonetheless the Senate Report stated that "the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program." S. Rep. No. 92–414, *supra*, at 71, 2 Leg. Hist. 1489. Like the States' argument that the EPA must withdraw completely from permit-issuing activity in a State with an approved program, this statement, on which the States rely, overlooks the possibility of a State's submitting a plan covering only some of its navigable waters. Although S. 2770, to which the Report referred, did include the provision permitting a State to submit a permit program to be administered under an interstate compact, see § 402 (c)(1), 2 Leg. Hist. 1689, it provided only that the EPA "shall suspend the issuance of permits under subsection (a) of this section." The phrase "as to those navigable waters subject to such program" was part of the House amendment, H. R. 11896, 1 Leg. Hist. 1058, and its inclusion in § 402 (c)(1) as enacted was not discussed in the Reports. Given this misapprehension in the Senate Report, we find the statement the States rely on to be an insufficient basis upon which to conclude, as the States urge, that the committee understood § 402 (c)(1) as if it read that upon approving a state plan the EPA must "suspend its activity in such State, or part of such State, under the Federal permit program, as to federal and nonfederal dischargers."

We are also unpersuaded by the States' argument that by limiting the EPA's authority to withdraw approval of a state program to withdrawing approval as to the entire program, Congress emphasized that only one government shall operate an NPDES permit program within a State. § 402 (c)(3), 33 U. S. C. § 1342 (c)(3) (1970 ed., Supp. IV). In our view, rejection of the EPA's proposal that the bill should be changed to permit withdrawal as to categories or classes of sources, 1 Leg. Hist. 854–855, reflected a concern that the States be given maximum responsibility for the permit system and that the EPA's review authority be restricted as much as was consistent with its overall responsibility for assuring attainment of national goals. H. R. Rep. No. 92–911, *supra*, at 127, 1 Leg.

The difficulty with this position is that under § 402, the EPA obviously need not, and may not, approve a state plan which the State has no authority to issue because it conflicts with federal law.[40] If § 313 expressly said that federal instrumentalities must comply with state discharge standards but need not secure state permits, it would be untenable to urge that a state plan which nevertheless attempts to subject federal agencies to state permit requirements would have to be approved simply because it was otherwise in compliance with § 402. As we construe § 313, this is the situation before us. By the same token, we do not think that EPA permit authority with respect to federal agencies terminates when the EPA purports to approve a state plan except for that portion of it which seeks to subject federal instrumentalities to the state permit regime.

From the outset of the EPA's administration of the NPDES and in its first regulations establishing the § 304 (h)(2) guidelines for state NPDES permit programs, see 37 Fed. Reg. 28391 (1972), the EPA has taken the position that authority to suspend issuance of EPA permits extends only "to those point sources subject to such approved program." 40 CFR § 124.2 (b) (1975). The implications that the state program would only embrace nonfederal dischargers on those navigable waters subject to the program and that the EPA

Hist. 814. Whether the States' maximum responsibility includes issuing permits to federal installations is, however, the question before us, and in view of the substantial review authority the EPA undoubtedly retains, see *supra*, at 208, its all-or-nothing authority to withdraw approval of a state NPDES program offers no meaningful support for the States' position that federal dischargers are required to secure state permits.

[40] Under § 402 (b), there must be ample legal authority to carry out the issuance of permits under the State's plan. See n. 15, *supra*.

was authorized to and would continue to issue permits to federal dischargers were soon made explicit in 40 CFR §§ 125.2 (a)(2), (b) (1975),[41] which provide that federal dischargers are to comply with the EPA permit program and that state NPDES permit programs do not cover federal agencies and instrumentalities. This construction by the agency charged with enforcement of the Amendments is reasonable and in the absence of any cogent argument that it is contrary to congressional intentions we sustain the EPA's understanding that the States are without authority to require federal dischargers to secure their NPDES permits.[42]

IV

Our conclusion is that the Federal Water Pollution Control Act Amendments of 1972 do not subject federal facilities to state NPDES permit requirements with the requisite degree of clarity. Should it be the intent of Congress to have the EPA approve a state NPDES program regulating federal as well as nonfederal point sources and suspend issuance of NPDES permits as to

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[41] 38 Fed. Reg. 13528 (1973).

[42] We also find unpersuasive on the issue before us the States' argument based upon §§ 306 (c), 308 (c), and 401 (a)(6), 33 U. S. C. §§ 1316 (c), 1318 (c), 1341 (a)(6) (1970 ed., Supp. IV), in which federal facilities are expressly exempted from certain forms of state regulation under the Amendments. The argument is that these sections demonstrate that Congress knew how to exempt federal facilities from state regulation, so that by not expressly providing that federal facilities need not secure state permits Congress clearly revealed an intention that federal facilities secure such permits. Although §§ 306, 308, and 401 are of obvious importance to the implementation of the goals and purposes of the Amendments, they are too incidental to the NPDES program for their treatment of federal facilities to offer any meaningful guidance on the question for decision in this case.

209-904 O - 78 - 18

all point sources discharging into the navigable waters subject to the State's program, it may legislate to make that intention manifest.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST dissent. They agree substantially with the reasoning of the Court of Appeals for the Ninth Circuit in this case, 511 F. 2d 963, and they would, accordingly, affirm its judgment.

Syllabus

WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. *v.* DAVIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74–1492. Argued March 1, 1976—Decided June 7, 1976

Respondents Harley and Sellers, both Negroes (hereinafter respondents), whose applications to become police officers in the District of Columbia had been rejected, in an action against District of Columbia officials (petitioners) and others, claimed that the Police Department's recruiting procedures, including a written personnel test (Test 21), were racially discriminatory and violated the Due Process Clause of the Fifth Amendment, 42 U. S. C. § 1981, and D. C. Code § 1–320. Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill. Respondents contended that the test bore no relationship to job performance and excluded a disproportionately high number of Negro applicants. Focusing solely on Test 21, the parties filed cross-motions for summary judgment. The District Court, noting the absence of any claim of intentional discrimination, found that respondents' evidence supporting their motion warranted the conclusions that (a) the number of black police officers, while substantial, is not proportionate to the city's population mix; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance. While that showing sufficed to shift the burden of proof to the defendants in the action, the court concluded that respondents were not entitled to relief, and granted petitioners' motion for summary judgment, in view of the facts that 44% of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area; that the Police Department had affirmatively sought to recruit blacks, many of whom passed the test but failed to report for duty; and that the test was a useful indicator of training school performance (precluding the need to show validation in terms of job performance) and was not designed to, and did not, discriminate against otherwise qualified blacks. Respondents on

appeal contended that their summary judgment motion (which was based solely on the contention that Test 21 invidiously discriminated against Negroes in violation of the Fifth Amendment) should have been granted. The Court of Appeals reversed, and directed summary judgment in favor of respondents, having applied to the constitutional issue the statutory standards enunciated in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use of tests that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance. The court held that the lack of discriminatory intent in the enactment and administration of Test 21 was irrelevant; that the critical fact was that four times as many blacks as whites failed the test; and that such disproportionate impact sufficed to establish a constitutional violation, absent any proof by petitioners that the test adequately measured job performance. *Held:*

1. The Court of Appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases. Pp. 238–248.

(a) Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional *solely* because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. Pp. 239–245.

(b) The Constitution does not prevent the Government from seeking through Test 21 modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing; and respondents, as Negroes, could no more ascribe their failure to pass the test to denial of equal protection than could whites who also failed. Pp. 245–246.

(c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and on the facts before it the District Court properly held that any inference of discrimination was unwarranted. P. 246.

(d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is

appropriate under the Constitution where, as in this case, special racial impact but no discriminatory purpose is claimed. Any extension of that statutory standard should await legislative prescription. Pp. 246–248.

2. Statutory standards similar to those obtaining under Title VII were also satisfied here. The District Court's conclusion that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and that program was sufficient to validate the test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on the record in this case, and no remand to establish further validation is appropriate. Pp. 248–252.

168 U. S. App. D. C. 42, 512 F. 2d 956, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and II of which STEWART, J., joined. STEVENS, J., filed a concurring opinion, *post*, p. 252. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 256.

David P. Sutton argued the cause for petitioners. With him on the briefs were *C. Francis Murphy, Louis P. Robbins,* and *Richard W. Barton.*

Richard B. Sobol argued the cause for respondents Harley et al. With him on the briefs were *George Cooper, Richard T. Seymour, Marian Wright Edelman, Michael B. Trister,* and *Ralph J. Temple. Mark L. Evans* argued the cause for the Commissioners of the United States Civil Service Commission as respondents under this Court's Rule 21 (4). With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Ronald R. Glancz,* and *Harry R. Silver.**

**R. Lawrence Ashe, Jr.*, and *Susan A. Cahoon* filed a brief for the Executive Committee of the Division of Industrial-Organizational Psychology (Div. 14) of the American Psychological Assn. as *amicus curiae* urging reversal.

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston,

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

I

This action began on April 10, 1970, when two Negro police officers filed suit against the then Commissioner of the District of Columbia, the Chief of the District's Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission.[1] An amended complaint, filed December 10, alleged that the promotion policies of the Department were racially discriminatory and sought a declaratory judgment and an injunction. The respondents Harley and Sellers were permitted to intervene, their amended complaint assert-

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Barry L. Goldstein, Deborah M. Greenberg, Eric Schnapper, and *O. Peter Sherwood* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Thaddeus Holt* for the American Society for Personnel Administration; and by *Howard P. Willens, Deanne C. Siemer,* and *John S. Kramer* for the Educational Testing Service.

[1] Under § 4–103 of the District of Columbia Code, appointments to the Metropolitan Police force were to be made by the Commissioner subject to the provisions of Title 5 of the United States Code relating to the classified civil service. The District of Columbia Council and the Office of Commissioner of the District of Columbia, established by Reorganization Plan No. 37 of 1967, were abolished as of January 2, 1975, and replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia.

ing that their applications to become officers in the Department had been rejected, and that the Department's recruiting procedures discriminated on the basis of race against black applicants by a series of practices including, but not limited to, a written personnel test which excluded a disproportionately high number of Negro applicants. These practices were asserted to violate respondents' rights "under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U. S. C. § 1981 and under D. C. Code § 1–320." [2] Defendants answered, and discovery and

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[2] Title 42 U. S. C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1–320 of the District of Columbia Code (1973) provides:

"In any program of recruitment or hiring of individuals to fill positions in the government of the District of Columbia, no officer or employee of the government of the District of Columbia shall exclude or give preference to the residents of the District of Columbia or any State of the United States on the basis of residence, religion, race, color, or national origin."

One of the provisions expressly made applicable to the Metropolitan Police force by § 4–103 is 5 U. S. C. § 3304 (a), which provides:

"§ 3304. Competitive service; examinations.

"(a) The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, for—

"(1) open, competitive examinations for testing applicants for appointment in the competitive service which are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought; and

"(2) noncompetitive examinations when competent applicants do

various other proceedings followed.[3] Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is "unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment . . . ." No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case, asserting that respondents were entitled to relief on neither constitutional nor statutory grounds.[4] The District Court granted petitioners' and denied respondents' motions. 348 F. Supp. 15 (DC 1972).

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police De-

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not compete after notice has been given of the existence of the vacancy."

The complaint asserted no claim under § 3304.

[3] Those proceedings included a hearing on respondents' motion for an order designating the case as a class action. A ruling on the motion was held in abeyance and was never granted insofar as the record before us reveals.

[4] In support of the motion, petitioners and the federal parties urged that they were in compliance with all applicable constitutional, statutory, and regulatory provisions, including the provisions of the Civil Service Act which since 1883 were said to have established a "job relatedness" standard for employment.

partment," and which was "designed to test verbal ability, vocabulary, reading and comprehension." *Id.*, at 16.

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." *Ibid.* Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to establish its reliability for measuring subsequent job performance." *Ibid.* This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was "satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates [*sic*] to discriminate

against otherwise qualified blacks." *Id.*, at 17. It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance—"The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process." *Ibid.* The District Court ultimately concluded that "[t]he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability" and that the Department "should not be required on this showing to lower standards or to abandon efforts to achieve excellence." [5] *Id.*, at 18.

Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The tendered constitutional issue was whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process of law contrary to the commands of the Fifth Amendment. The Court of Appeals, addressing that issue, announced that it would be guided by *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), a case involving the interpretation and application of Title VII of the Civil Rights Act of 1964, and held that the statutory standards elucidated in that case were to govern the due process question tendered in this one.[6] 168 U. S. App. D. C. 42,

[5] When summary judgment was granted, the case with respect to discriminatory promotions was still pending. The District Court, however, made the determination and direction authorized by Fed. Rule Civ. Proc. 54 (b). The promotion issue was subsequently decided adversely to the original plaintiffs. *Davis* v. *Washington*, 352 F. Supp. 187 (DC 1972).

[6] "Although appellants' complaint did not allege a violation of Title VII of the Civil Rights Act of 1964, which then was inappli-

512 F. 2d 956 (1975). The court went on to declare that lack of discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of blacks—four times as many—failed the test than did whites. This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge. That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the racial makeup of the surrounding community, broadly conceived, was put aside as a "comparison [not] material to this appeal." *Id.*, at 46 n. 24, 512 F. 2d, at 960 n. 24. The Court of Appeals, over a dissent, accordingly reversed the judgment of the District Court and directed that respondents' motion for partial summary judgment be granted. We granted the petition for certiorari, 423 U. S. 820 (1975), filed by the District of Columbia officials.[7]

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cable to the Federal Government, decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in this case . . . . The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII." 168 U. S. App. D. C. 42, 44 n. 2, 512 F. 2d 956, 958 n. 2 (1975).

[7] The Civil Service Commissioners, defendants in the District Court, did not petition for writ of certiorari but have filed a brief as respondents. See our Rule 21 (4). We shall at times refer to them as the "federal parties."

II

Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Although the petition for certiorari did not present this ground for reversal,[8] our Rule 40 (1)(d)(2) provides that we "may notice a plain error not presented";[9] and this is an appropriate occasion to invoke the Rule.

As the Court of Appeals understood Title VII,[10] employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion

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[8] Apparently not disputing the applicability of the *Griggs* and Title VII standards in resolving this case, petitioners presented issues going only to whether *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), had been misapplied by the Court of Appeals.

[9] See, *e. g.*, *Silber* v. *United States*, 370 U. S. 717 (1962); *Carpenters* v. *United States*, 330 U. S. 395, 412 (1947); *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16 (1941); *Mahler* v. *Eby*, 264 U. S. 32, 45 (1924); *Weems* v. *United States*, 217 U. S. 349, 362 (1910).

[10] Although Title VII standards have dominated this case, the statute was not applicable to federal employees when the complaint was filed; and although the 1972 amendments extending the Title to reach Government employees were adopted prior to the District Court's judgment, the complaint was not amended to state a claim under that Title, nor did the case thereafter proceed as a Title VII case. Respondents' motion for partial summary judgment, filed after the 1972 amendments, rested solely on constitutional grounds; and the Court of Appeals ruled that the motion should have been granted.

At the oral argument before this Court, when respondents' counsel was asked whether "this is just a purely Title VII case as it comes to us from the Court of Appeals without any constitutional overtones," counsel responded: "My trouble honestly with that proposition is the procedural requirements to get into court under Title VII, and this case has not met them." Tr. of Oral Arg. 66.

practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

Almost 100 years ago, *Strauder* v. *West Virginia,* 100 U. S. 303 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins* v. *Texas,* 325 U. S. 398, 403–404 (1945). A defendant in a criminal case is entitled "to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." *Alexander* v. *Louisiana,* 405 U. S. 625, 628–629 (1972). See also *Carter* v. *Jury Comm'n,* 396 U. S. 320, 335–

337, 339 (1970); *Cassell* v. *Texas*, 339 U. S. 282, 287–290 (1950); *Patton* v. *Mississippi*, 332 U. S. 463, 468–469 (1947).

The rule is the same in other contexts. *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.*, at 56, 58. The dissenters were in agreement that the issue was whether the "boundaries . . . were purposefully drawn on racial lines." *Id.*, at 67.

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action." *Keyes* v. *School Dist. No. 1*, 413 U. S. 189, 205 (1973). "The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.*, at 208. See also *id.*, at 199, 211, 213. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "[t]he acceptance of appel-

lants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Jefferson* v. *Hackney,* 406 U. S. 535, 548 (1972). And compare *Hunter* v. *Erickson,* 393 U. S. 385 (1969), with *James* v. *Valtierra,* 402 U. S. 137 (1971).

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." *Akins* v. *Texas, supra,* at 404. *Smith* v. *Texas,* 311 U. S. 128 (1940); *Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Neal* v. *Delaware,* 103 U. S. 370 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, *Hill* v. *Texas,* 316 U. S. 400, 404 (1942), or with racially nonneutral selection procedures, *Alexander* v. *Louisiana, supra; Avery* v. *Georgia,* 345 U. S. 559 (1953); *Whitus* v. *Georgia,* 385 U. S. 545 (1967). With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander, supra,* at 632. See also *Turner* v. *Fouche,* 396 U. S. 346, 361 (1970); *Eubanks* v. *Louisiana,* 356 U. S. 584, 587 (1958).

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin* v. *Florida,* 379 U. S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

There are some indications to the contrary in our cases. In *Palmer* v. *Thompson,* 403 U. S. 217 (1971), the city of Jackson, Miss., following a court decree to this effect, desegregated all of its public facilities save five swimming pools which had been operated by the city and which, following the decree, were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order and that integrated pools could not be economically operated. Accepting the finding that the pools were closed to avoid violence and economic loss, this Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that

racially invidious motivations had prompted the city council's action. The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes. The opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

Wright v. *Council of City of Emporia,* 407 U. S. 451 (1972), also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part." *Id.,* at 459. There was thus no need to find "an independent constitutional violation." *Ibid.* Citing *Palmer* v. *Thompson,* we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.

That neither *Palmer* nor *Wright* was understood to have changed the prevailing rule is apparent from *Keyes* v. *School Dist. No. 1, supra,* where the principal issue

209-904 O - 78 - 19

in litigation was whether and to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. Nor did other later cases, *Alexander* v. *Louisiana, supra,* and *Jefferson* v. *Hackney, supra,* indicate that either *Palmer* or *Wright* had worked a fundamental change in equal protection law.[11]

Both before and after *Palmer* v. *Thompson,* however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.[12] The

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[11] To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases—as indicated in the text—are to the contrary; and very shortly after *Palmer,* all Members of the Court majority in that case joined the Court's opinion in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971), which dealt with the issue of public financing for private schools and which announced, as the Court had several times before, that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute.

[12] Cases dealing with public employment include: *Chance* v. *Board of Examiners,* 458 F. 2d 1167, 1176–1177 (CA2 1972); *Castro* v. *Beecher,* 459 F. 2d 725, 732–733 (CA1 1972); *Bridgeport Guardians* v. *Bridgeport Civil Service Comm'n,* 482 F. 2d 1333, 1337 (CA2 1973); *Harper* v. *Mayor of Baltimore,* 359 F. Supp. 1187, 1200 (Md.), aff'd in pertinent part *sub nom. Harper* v. *Kloster,* 486 F. 2d 1134 (CA4 1973); *Douglas* v. *Hampton,* 168 U. S. App. D. C. 62, 67, 512 F. 2d 976, 981 (1975); but cf. *Tyler* v. *Vickery,* 517 F. 2d 1089, 1096–1097 (CA5 1975), cert. pending, No. 75–1026. There are also District Court cases: *Wade* v. *Mississippi Cooperative Extension Serv.,* 372 F. Supp. 126, 143 (ND Miss. 1974); *Arnold* v. *Ballard,* 390 F. Supp. 723, 736, 737 (ND Ohio 1975);

cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that

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United States v. *City of Chicago*, 385 F. Supp. 543, 553 (ND Ill. 1974); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721, 724 (Minn. 1972), rev'd on other grounds, 498 F. 2d 143 (CA8 1974).

In other contexts there are *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (CA2 1968) (urban renewal); *Kennedy Park Homes Assn.* v. *City of Lackawanna*, 436 F. 2d 108, 114 (CA2 1970), cert. denied, 401 U. S. 1010 (1971) (zoning); *Southern Alameda Spanish Speaking Organization* v. *Union City*, 424 F. 2d 291 (CA9 1970) (dictum) (zoning); *Metropolitan H. D. Corp.* v. *Village of Arlington Heights*, 517 F. 2d 409 (CA7), cert. granted, 423 U. S. 1030 (1975) (zoning); *Gautreaux* v. *Romney*, 448 F. 2d 731, 738 (CA7 1971) (dictum) (public housing); *Crow* v. *Brown*, 332 F. Supp. 382, 391 (ND Ga. 1971), aff'd, 457 F. 2d 788 (CA5 1972) (public housing); *Hawkins* v. *Town of Shaw*, 437 F. 2d 1286 (CA5 1971), aff'd on rehearing en banc, 461 F. 2d 1171 (1972) (municipal services).

the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability." 348 F. Supp., at 18.

Under Title VII, Congress provided that when hiring

and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question.[13] However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes

[13] It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance. Professional standards developed by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals (1966), accept three basic methods of validation: "empirical" or "criterion" validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); "construct" validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and "content" validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant). These standards have been relied upon by the Equal Employment Opportunity Commission in fashioning its Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1975), and have been judicially noted in cases where validation of employment tests has been in issue. See, *e. g., Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 431 (1975); *Douglas* v. *Hampton,* 168 U. S. App. D. C., at 70, 512 F. 2d, at 984; *Vulcan Society* v. *Civil Service Comm'n,* 490 F. 2d 387, 394 (CA2 1973).

of applying the Fifth and the Fourteenth Amendments in cases such as this.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[14]

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

As we have indicated, it was error to direct summary judgment for respondents based on the Fifth Amendment.

III

We also hold that the Court of Appeals should have affirmed the judgment of the District Court granting the motions for summary judgment filed by petitioners and the federal parties. Respondents were entitled to relief on neither constitutional nor statutory grounds.

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[14] Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 300 (1972), suggests that disproportionate-impact analysis might invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule. Silverman, Equal Protection, Economic Legislation, and Racial Discrimination, 25 Vand. L. Rev. 1183 (1972). See also Demsetz, Minorities in the Market Place, 43 N. C. L. Rev. 271 (1965).

The submission of the defendants in the District Court was that Test 21 complied with all applicable statutory as well as constitutional requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied.[15] The District Court also assumed that Title VII standards were to control the case, identified the determinative issue as whether Test 21 was sufficiently job related and proceeded to uphold use of the test because it was "directly related to a determination of whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy." 348 F. Supp., at 17. The Court of Appeals reversed because the relationship between Test 21 and training school success, if demonstrated at all, did not satisfy what it deemed to be the crucial requirement

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[15] In their memorandum supporting their motion for summary judgment, the federal parties argued:

"In *Griggs, supra*, the Supreme Court set a job-relationship standard for the private sector employers which has been a standard for federal employment since the passage of the Civil Service Act in 1883. In that act Congress has mandated that the federal government must use '. . . examinations for testing applicants for appointment . . . which . . . as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointments sought.' 5 U. S. C. § 3304 (a)(1). Defendants contend that they have been following the job-related standards of *Griggs, supra*, for the past eighty-eight years by virtue of the enactment of the Civil Service Act which guaranteed open and fair competition for jobs."

They went on to argue that the *Griggs* standard had been satisfied. In granting the motions for summary judgment filed by petitioners and the federal parties, the District Court necessarily decided adversely to respondents the statutory issues expressly or tacitly tendered by the parties.

of a direct relationship between performance on Test 21 and performance on the policeman's job.

We agree with petitioners and the federal parties that this was error. The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge, and by the current views of the Civil Service Commissioners who were parties to the case.[16] Nor is the

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[16] See n. 17, *infra*. Current instructions of the Civil Service Commission on "Examining, Testing, Standards, and Employment Practices" provide in pertinent part:

"S2–2—Use of applicant appraisal procedures

"a. *Policy*. The Commission's staff develops and uses applicant appraisal procedures to assess the knowledges, skills, and abilities of persons for jobs and not persons in the abstract.

"(1) Appraisal procedures are designed to reflect real, reasonable, and necessary qualifications for effective job behavior.

"(2) An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:

"(a) Effective job performance;

conclusion foreclosed by either *Griggs* or *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405 (1975); and it seems to us the much more sensible construction of the job-relatedness requirement.

The District Court's accompanying conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record; [17]

"(b) Capability;

"(c) Success in training;

"(d) Reduced turnover; or

"(e) Job satisfaction." 37 Fed. Reg. 21557 (1972).

See also Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 CFR § 1607.5 (b)(3) (1975), discussed in *Albemarle Paper Co.* v. *Moody,* 422 U. S., at 430–435.

[17] The record includes a validation study of Test 21's relationship to performance in the recruit training program. The study was made by D. L. Futransky of the Standards Division, Bureau of Policies and Standards, United States Civil Service Commission. App. 99–109. Findings of the study included data "support[ing] the conclusion that T[est] 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School." *Id.,* at 103. Opinion evidence, submitted by qualified experts examining the Futransky study and/or conducting their own research, affirmed the correlation between scores on Test 21 and success in the training program. *E. g.,* Affidavit of Dr. Donald J. Schwartz (personnel research psychologist, United States Civil Service Commission), App. 178, 183 ("It is my opinion . . . that Test 21 has a significant positive correlation with success in the MPD Recruit School for both Blacks and whites and is therefore shown to be job related . . ."); affidavit of Diane E. Wilson (personnel research psychologist, United States Civil Service Commission), App. 185, 186 ("It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training").

The Court of Appeals was "willing to assume for purposes of this appeal that appellees have shown that Test 21 is predictive of fur-

and we are not convinced that this conclusion was erroneous.

The federal parties, whose views have somewhat changed since the decision of the Court of Appeals and who still insist that training-program validation is sufficient, now urge a remand to the District Court for the purpose of further inquiry into whether the training-program test scores, which were found to correlate with Test 21 scores, are themselves an appropriate measure of the trainee's mastership of the material taught in the course and whether the training program itself is sufficiently related to actual performance of the police officer's task. We think a remand is inappropriate. The District Court's judgment was warranted by the record before it, and we perceive no good reason to reopen it, particularly since we were informed at oral argument that although Test 21 is still being administered, the training program itself has undergone substantial modification in the course of this litigation. If there are now deficiencies in the recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that Title.

The judgment of the Court of Appeals accordingly is reversed.

So ordered.

MR. JUSTICE STEWART joins Parts I and II of the Court's opinion.

MR. JUSTICE STEVENS, concurring.

While I agree with the Court's disposition of this case, I add these comments on the constitutional issue dis-

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ther progress in Recruit School." 168 U. S. App. D. C., at 48, 512 F. 2d, at 962.

cussed in Part II and the statutory issue discussed in Part III of the Court's opinion.

The requirement of purposeful discrimination is a common thread running through the cases summarized in Part II. These cases include criminal convictions which were set aside because blacks were excluded from the grand jury, a reapportionment case in which political boundaries were obviously influenced to some extent by racial considerations, a school desegregation case, and a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion* v. *Lightfoot,* 364 U. S. 339, or *Yick Wo* v. *Hopkins,* 118 U. S. 356, it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.*

My agreement with the conclusion reached in Part II of the Court's opinion rests on a ground narrower than the Court describes. I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither those efforts nor the subjective good faith of the District administration, would save Test 21 if it were otherwise invalid.

There are two reasons why I am convinced that the challenge to Test 21 is insufficient. First, the test serves the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function, there is no evidence that the required passing grade was set at an arbitrarily high level, and there is sufficient disparity among high schools and high school graduates to justify the use of a separate uniform test. Second,

*Specifically, I express no opinion on the merits of the cases listed in n. 12 of the Court's opinion.

the same test is used throughout the federal service. The applicants for employment in the District of Columbia Police Department represent such a small fraction of the total number of persons who have taken the test that their experience is of minimal probative value in assessing the neutrality of the test itself. That evidence, without more, is not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as its "purpose" as that term is used in constitutional adjudication.

My study of the statutory issue leads me to the same conclusion reached by the Court in Part III of its opinion. Since the Court of Appeals set aside the portion of the District Court's summary judgment granting the defendants' motion, I agree that we cannot ignore the statutory claims even though, as the Court makes clear, *ante*, at 238 n. 10, there is no Title VII question in this case. The actual statutory holdings are limited to 42 U. S. C. § 1981 and § 1–320 of the District of Columbia Code, to which regulations of the Equal Employment Opportunity Commission have no direct application.

The parties argued the case as though Title VII standards were applicable. In a general way those standards shed light on the issues, but there is sufficient individuality and complexity to that statute, and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history. Moreover, the subject matter of this case—the validity of qualifications for the law enforcement profession—is one in which federal district judges have a greater expertise than in many others. I therefore do not regard this as a case in which the District Court was required to apply Title VII standards as strictly as would

be necessary either in other contexts or in litigation actually arising under that statute.

The Court's specific holding on the job-relatedness question contains, I believe, two components. First, as a matter of law, it is permissible for the police department to use a test for the purpose of predicting ability to master a training program even if the test does not otherwise predict ability to perform on the job. I regard this as a reasonable proposition and not inconsistent with the Court's prior holdings, although some of its prior language obviously did not contemplate this precise problem. Second, as a matter of fact, the District Court's finding that there was a correlation between success on the test and success in the training program has sufficient evidentiary support to withstand attack under the "clearly erroneous" standard mandated by Fed. Rule Civ. Proc. 52 (a). Whether or not we would have made the same finding of fact, the opinion evidence identified in n. 17 of the Court's opinion—and indeed the assumption made by the Court of Appeals quoted therein—is surely adequate to support the finding under the proper standard of appellate review.

On the understanding that nothing which I have said is inconsistent with the Court's reasoning, I join the opinion of the Court except to the extent that it expresses an opinion on the merits of the cases cited *ante*, at 244–245, n. 12.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court holds that the job qualification examination (Test 21) given by the District of Columbia Metropolitan Police Department does not unlawfully discriminate on the basis of race under either constitutional or statutory standards.

Initially, it seems to me that the Court should not pass on the statutory questions, because they are not presented by this case. The Court says that respondents' summary judgment motion "rested on purely constitutional grounds," *ante,* at 236, and that "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it," *ante,* at 238. There is a suggestion, however, that petitioners are entitled to prevail because they met the burden of proof imposed by 5 U. S. C. § 3304. *Ante,* at 249 n. 15. As I understand the opinion, the Court therefore holds that Test 21 is job related under § 3304, but not necessarily under Title VII. But that provision, by the Court's own analysis, is no more in the case than Title VII; respondents' "complaint asserted no claim under § 3304." *Ante,* at 234 n. 2. Cf. *ante,* at 238 n. 10. If it was "plain error" for the Court of Appeals to apply a statutory standard to this case, as the Court asserts, *ante,* at 238–239, then it is unfortunate that the Court does not recognize that it is also plain error to address the statutory issues in Part III of its opinion.

Nevertheless, although it appears unnecessary to reach the statutory questions, I will accept the Court's conclusion that respondents were entitled to summary judgment if they were correct in their statutory arguments, and I would affirm the Court of Appeals because petitioners have failed to prove that Test 21 satisfies the applicable statutory standards.[1] All parties' arguments and

[1] Although I do not intend to address the constitutional questions considered by the Court in Part II of its opinion, I feel constrained to comment upon the propriety of footnote 12, *ante,* at 244–245. One of the cases "disapproved" therein is presently scheduled for plenary consideration by the Court in the 1976 Term, *Metropolitan*

both lower court decisions were based on Title VII standards. In this context, I think it wrong to focus on § 3304 to the exclusion of the Title VII standards, particularly because the Civil Service Commission views the job-relatedness standards of Title VII and § 3304 as identical.[2] See also *infra*, at 263.

In applying a Title VII test,[3] both the District Court and the Court of Appeals held that respondents had offered sufficient evidence of discriminatory impact to shift to petitioners the burden of proving job relatedness. 348 F. Supp. 15, 16; 168 U. S. App. D. C. 42, 45–47, 512 F. 2d 956, 959–961. The Court does not question these rulings, and the only issue before us is what petitioners were required to show and whether they carried their burden. The Court agrees with the District Court's conclusion that Test 21 was validated by a positive relationship between Test 21 scores and performance in police training courses. This result is based upon the Court's reading of the record, its interpretation of in-

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Housing Development Corp. v. *Village of Arlington Heights*, 517 F. 2d 409 (CA7), cert. granted, 423 U. S. 1030 (1975). If the Court regarded this case only a few months ago as worthy of full briefing and argument, it ought not be effectively reversed merely by its inclusion in a laundry list of lower court decisions.

[2] The only administrative authority relied on by the Court in support of its result is a regulation of the Civil Service Commission construing the civil service employment standards in Title 5 of the United States Code. *Ante*, at 250–251, n. 16. I note, however, that 5 U. S. C. § 3304 was brought into this case by the CSC, not by respondents, and the CSC's only reason for referring to that provision was to establish that petitioners had been "following the job-related standards of *Griggs* [v. *Duke Power Co.*, 401 U. S. 424 (1971),] for the past eighty-eight years." *Ante*, at 249 n. 15.

[3] The provision in Title VII on which petitioners place principal reliance is 42 U. S. C. § 2000e–2 (h). See *Griggs* v. *Duke Power Co.*, *supra*, at 433–436.

structions governing testing practices issued by the Civil Service Commission (CSC), and "the current views of the Civil Service Commissioners who were parties to the case." We are also assured that today's result is not foreclosed by *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). Finally, the Court asserts that its conclusion is "the much more sensible construction of the job-relatedness requirement." *Ante*, at 251.

But the CSC instructions cited by the Court do not support the District Court's conclusion. More importantly, the brief filed in this Court by the CSC takes the position that petitioners did not satisfy the burden of proof imposed by the CSC guidelines. It also appears that longstanding regulations of the Equal Employment Opportunity Commission (EEOC)—previously endorsed by this Court—require a result contrary to that reached by the Court. Furthermore, the Court's conclusion is inconsistent with my understanding of the interpretation of Title VII in *Griggs* and *Albemarle*. I do not find this conclusion "much more sensible," and with all respect I suggest that today's decision has the potential of significantly weakening statutory safeguards against discrimination in employment.

I

On October 12, 1972, the CSC issued a supplement to the Federal Personnel Manual containing instructions for compliance with its general regulations concerning employment practices.[4] The provision cited by the Court

[4] See 5 CFR § 300.101 *et seq.* (1976). These instructions contain the "regulations" that the Court finds supportive of the District Court's conclusion, which was reached under Title VII, but neither the instructions nor the general regulations are an interpretation of

209-904 O - 78 - 20

requires that Test 21 "have a demonstrable and rational relationship to important job-related performance objectives identified by management." "Success in training" is one example of a possible objective. The statistical correlation established by the Futransky validity study, *ante*, at 251 n. 17, was between applicants' scores on Test 21 and recruits' average scores on final examinations given during the police training course.

It is hornbook law that the Court accord deference to the construction of an administrative regulation when that construction is made by the administrative authority responsible for the regulation. *E. g., Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). It is worthy of note, therefore, that the brief filed by the CSC in this case interprets the instructions in a manner directly contrary to the Court, despite the Court's claim that its result is supported by the Commissioners' "current views."

> "Under Civil Service Commission regulations and current professional standards governing criterion-related test validation procedures, the job-relatedness of an entrance examination may be demonstrated by proof that scores on the examination predict properly measured success in job-relevant training (regardless of whether they predict success on the job itself).
>
> "The documentary evidence submitted in the district court demonstrates that scores on Test 21 are predictive of Recruit School Final Averages. There

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Title VII. The instructions were issued "under authority of sections 3301 and 3302 of title 5, United States Code, and E. O. 10577, 3 CFR 1954–58 Comp., p. 218." 37 Fed. Reg. 21552 (1972). The pertinent regulations of the CSC in 5 CFR § 300.101 *et seq.* were promulgated pursuant to the same authorities, as well as 5 U. S. C. §§ 7151, 7154 and Exec. Order No. 11478, 3 CFR 803 (1966–1970 Comp.).

> is little evidence, however, concerning the relationship between the Recruit School tests and the substance of the training program, and between the substance of the training program and the post-training job of a police officer. *It cannot be determined, therefore, whether the Recruit School Final Averages are a proper measure of success in training and whether the training program is job-relevant.*" Brief for CSC 14–15 (emphasis added).

The CSC maintains that a positive correlation between scores on entrance examinations and the criterion of success in training may establish the job relatedness of an entrance test—thus relieving an employer from the burden of providing a relationship to job performance after training—but only subject to certain limitations.

> "Proof that scores on an entrance examination predict scores on training school achievement tests, however, does not, by itself, satisfy the burden of demonstrating the job-relatedness of the entrance examination. There must also be evidence—the nature of which will depend on the particular circumstances of the case—showing that the achievement test scores are an appropriate measure of the trainee's mastery of the material taught in the training program and that the training program imparts to a new employee knowledge, skills, or abilities required for performance of the post-training job." *Id.*, at 24–25.

Applying its standards [5] the CSC concludes that none of

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[5] The CSC asserts that certain of its guidelines have some bearing on Test 21's job relatedness. Under the CSC instructions, "'criterion-related' validity," see *Douglas* v. *Hampton*, 168 U. S. App. D. C. 62, 70 n. 60, 512 F. 2d 976, 984 n. 60 (1975), can be established by

the evidence presented in the District Court established "the appropriateness of using Recruit School Final Averages as the measure of training performance or the relationship of the Recruit School program to the job of a police officer." *Id.*, at 30.[6]

The CSC's standards thus recognize that Test 21 can be validated by a correlation between Test 21 scores and recruits' averages on training examinations only if (1) the training averages predict job performance or (2) the averages are proved to measure performance in job-related training. There is no proof that the recruits' average is correlated with job performance after completion of training. See n. 10, *infra*. And although a positive relationship to the recruits' average might be sufficient to validate Test 21 if the average were proved to reflect mastery of material on the training curriculum that was in turn demonstrated to be relevant to job performance, the record is devoid of proof in this regard. First, there is no demonstration by petitioners that the training-course examinations measure comprehension of the training curriculum; indeed, these examinations do not even appear in the record. Furthermore, the Futransky study simply designated an average of 85 on the

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demonstrating a correlation between entrance examination scores and "a criterion which is legitimately based on the needs of the Federal Government." ¶ S3–2 (a) (2), 37 Fed. Reg. 21558 (1972). Further, to prove validity, statistical studies must demonstrate that Test 21, "to a significant degree, measures performance or qualifications requirements which are relevant to the job or jobs for which candidates are being evaluated." ¶ S3–3 (a), 37 Fed. Reg. 21558 (1972). These provisions are ignored in the Court's opinion.

[6] On this basis, the CSC argues that the case ought to be remanded to enable petitioners to try to make such a demonstration, but this resolution seems to me inappropriate. Both lower courts recognized that petitioners had the burden of proof, and as this burden is yet unsatisfied, respondents are entitled to prevail.

examination as a "good" performance and assumed that a recruit with such an average learned the material taught in the training course.[7] Without any further proof of the significance of a score of 85, and there is none in the record, I cannot agree that Test 21 is predictive of "success in training."

II

Today's decision is also at odds with EEOC regulations issued pursuant to explicit authorization in Title VII. 42 U. S. C. § 2000e–12 (a). Although the dispute in this case is not within the EEOC's jurisdiction, as I noted above, the proper construction of Title VII nevertheless is relevant. Moreover, the 1972 extension of Title VII to public employees gave the same substantive protection to those employees as had previously been accorded in the private sector, *Morton* v. *Mancari,* 417 U. S. 535, 546–547 (1974), and it is therefore improper to maintain different standards in the public and private sectors. *Chandler* v. *Roudebush,* 425 U. S. 840, 864 (1976). See n. 2, *supra.*

As with an agency's regulations, the construction of a statute by the agency charged with its administration is entitled to great deference. *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U. S. 205, 210 (1972); *Udall* v. *Tallman,* 380 U. S., at 16; *Power Reactor Co.* v. *Electricians,* 367 U. S. 396, 408 (1961). The defer-

[7] The finding in the Futransky study on which the Court relies, *ante,* at 251 n. 17, was that Test 21 "is effective in selecting trainees who can learn the material that is taught at the Recruit School," because it predicts averages over 85. On its face, this would appear to be an important finding, but the fact is that *everyone* learns the material included in the training course. The study noted that all recruits pass the training examinations; if a particular recruit has any difficulty, he is given assistance until he passes.

ence due the pertinent EEOC regulations is enhanced by the fact that they were neither altered nor disapproved when Congress extensively amended Title VII in 1972.[8] *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395, 410 (1975); *Cammarano* v. *United States*, 358 U. S. 498, 510 (1959); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 547 (1954); *Massachusetts Mut. Life Ins. Co.* v. *United States*, 288 U. S. 269, 273 (1933). These principles were followed in *Albemarle*—where the Court explicitly endorsed various regulations no fewer than eight times in its opinion, 422 U. S., at 431–436[9]—and *Griggs*, 401 U. S., at 433–434.

The EEOC regulations require that the validity of a job qualification test be proved by "empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 CFR § 1607.4 (c) (1975). This construction of Title VII was approved in *Albemarle*, where we quoted this provision and remarked that "[t]he message of these Guidelines is the same as that of the *Griggs* case." 422 U. S., at 431. The regulations also set forth minimum standards for

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[8] Still another factor mandates deference to the EEOC regulations. The House and Senate committees considering the 1972 amendments to Title VII recognized that discrimination in employment, including the use of testing devices, is a "complex and pervasive phenomenon." S. Rep. No. 92–415, p. 5 (1971); H. R. Rep. No. 92–238, p. 8 (1971). As a result, both committees noted the need to obtain "expert assistance" in this area. S. Rep. No. 92–415, *supra*, at 5; H. R. Rep. No. 92–238, *supra*, at 8.

[9] Indeed, two Justices asserted that the Court relied too heavily on the EEOC guidelines. 422 U. S., at 449 (BLACKMUN, J., concurring in judgment); *id.*, at 451 (BURGER, C. J., concurring in part and dissenting in part).

validation and delineate the criteria that may be used for this purpose.

> "The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses." 29 CFR § 1607.5 (b)(3) (1975).

This provision was also approved in *Albemarle.* 422 U. S., at 432, and n. 30.

If we measure the validity of Test 21 by this standard, which I submit we are bound to do, petitioners' proof is deficient in a number of ways similar to those noted above. First, the criterion of final training examination averages does not appear to be "fully described." Although the record contains some general discussion of the training curriculum, the examinations are not in the record, and there is no other evidence completely elucidating the subject matter tested by the training examinations. Without this required description we cannot determine whether the correlation with training examination averages is sufficiently related to petitioners' need to ascertain "job-specific ability." See *Albemarle,* 422 U. S., at 433. Second, the EEOC regulations do not expressly permit validation by correlation to training performance, unlike the CSC instructions. Among the specified criteria the closest to training performance is "training time." All recruits to the Metropolitan Police Department, however, go through the

same training course in the same amount of time, including those who experience some difficulty. See n. 7, *supra*. Third, the final requirement of § 1607.5 (b)(3) has not been met. There has been no job analysis establishing the significance of scores on training examinations, nor is there any other type of evidence showing that these scores are of "major or critical" importance.

Accordingly, EEOC regulations that have previously been approved by the Court set forth a construction of Title VII that is distinctly opposed to today's statutory result.

III

The Court also says that its conclusion is not foreclosed by *Griggs* and *Albemarle*, but today's result plainly conflicts with those cases. *Griggs* held that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be *related to job performance*, the practice is prohibited." 401 U. S., at 431 (emphasis added). Once a discriminatory impact is shown, the employer carries the burden of proving that the challenged practice "bear[s] a *demonstrable relationship to successful performance of the jobs* for which it was used." *Ibid.* (emphasis added). We observed further:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.*, at 436.

Albemarle read *Griggs* to require that a discriminatory test be validated through proof "by professionally acceptable methods" that it is " 'predictive of or signifi-

cantly correlated with *important* elements of work behavior *which comprise or are relevant to the job or jobs* for which candidates are being evaluated.'" 422 U. S., at 431 (emphasis added), quoting 29 CFR § 1607.4(c) (1975). Further, we rejected the employer's attempt to validate a written test by proving that it was related to supervisors' job performance ratings, because there was no demonstration that the ratings accurately reflected job performance. We were unable "to determine whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." 422 U. S., at 433 (emphasis in original). To me, therefore, these cases read Title VII as requiring proof of a significant relationship to job performance to establish the validity of a discriminatory test. See also *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802, and n. 14 (1973). Petitioners do not maintain that there is a demonstrated correlation between Test 21 scores and job performance. Moreover, their validity study was unable to discern a significant positive relationship between training averages and job performance.[10] Thus, there is no proof of a correlation—either direct or indirect—between Test 21 and performance of the job of being a police officer.

It may well be that in some circumstances, proof of a relationship between a discriminatory qualification test and training performance is an acceptable substitute for establishing a relationship to job performance. But this question is not settled, and it should not be re-

[10] Although the validity study found that Test 21 predicted job performance for white officers, but see *Albemarle*, 422 U. S., at 433, no similar relationship existed for black officers. The same finding was made as to the relationship between training examination averages and job performance. See *id.*, at 435.

solved by the minimal analysis in the Court's opinion.[11] Moreover, it is particularly inappropriate to decide the question on this record. "Professionally acceptable methods" apparently recognize validation by proof of a correlation with training performance, rather than job performance, if (1) the training curriculum includes information proved to be important to job performance and (2) the standard used as a measure of training performance is shown to reflect the trainees' mastery of the material included in the training curriculum. See Brief for CSC 24–29; Brief for the Executive Committee of Division 14 of the American Psychological Assn. as *Amicus Curiae* 37–43. But no authority, whether professional, administrative, or judicial, has accepted the sufficiency of a correlation with training performance in the absence of such proof. For reasons that I have stated above, the record does not adequately establish either factor. As a result, the Court's conclusion cannot be squared with the focus on job performance in *Griggs* and *Albemarle*, even if this substitute showing is reconcilable with the holdings in those cases.

Today's reduced emphasis on a relationship to job performance is also inconsistent with clearly expressed congressional intent. A section-by-section analysis of the 1972 amendments to Title VII states as follows:

> "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would

[11] The Court of Appeals recognized that deciding whether 42 U. S. C. § 2000e–2 (h) permitted such proof "is not a simple or insignificant endeavor." 168 U. S. App. D. C. 42, 50 n. 59, 512 F. 2d 956, 964 n. 59. The court declined to express any view on this issue on the ground that petitioners had not satisfied this standard even if it were acceptable, which seems to me the proper treatment of the question.

> continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166 (1972).

The pre-1972 judicial decisions dealing with standardized tests used as job qualification requirements uniformly follow the EEOC regulations discussed above and insist upon proof of a relationship to job performance to prove that a test is job related.[12] Furthermore, the Court ignores Congress' explicit hostility toward the use of written tests as job-qualification requirements; Congress disapproved the CSC's "use of general ability tests which are not aimed at any direct relationship to specific jobs." H. R. Rep. No. 92–238, p. 24 (1971). See S. Rep. No. 92–415, pp. 14–15 (1971). Petitioners concede that Test 21 was devised by the CSC for general use and was not designed to be used by police departments.

Finally, it should be observed that every federal court, except the District Court in this case, presented with proof identical to that offered to validate Test 21 has reached a conclusion directly opposite to that of the

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[12] *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418, 456–457 (CA5 1971), cert. denied, 406 U. S. 906 (1972); *Hicks* v. *Crown Zellerbach Corp.*, 319 F. Supp. 314, 319–321 (ED La. 1970) (issuing preliminary injunction), 321 F. Supp. 1241, 1244 (1971) (issuing permanent injunction). See also *Castro* v. *Beecher*, 334 F. Supp. 930 (Mass. 1971), aff'd in part and rev'd in part on other grounds, 459 F. 2d 725 (CA1 1972); *Western Addition Community Org.* v. *Alioto*, 330 F. Supp. 536, 539–540 (ND Cal. 1971), 340 F. Supp. 1351, 1354–1356 (1972) (issuing preliminary injunction), 360 F. Supp. 733 (1973) (issuing permanent injunction); *Chance* v. *Board of Examiners*, 330 F. Supp. 203 (SDNY 1971), aff'd, 458 F. 2d 1167 (CA2 1972); *Baker* v. *Columbus Mun. Sep. School Dist.*, 329 F. Supp. 706, 721–722 (ND Miss. 1971), aff'd, 462 F. 2d 1112 (CA5 1972); *Arrington* v. *Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (Mass. 1969).

Court today.[13] Sound policy considerations support the view that, at a minimum, petitioners should have been required to prove that the police training examinations either measure job-related skills or predict job performance. Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than "job-specific ability." As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is "job related" is plainly erroneous. It seems to me, however, that the Court's holding in this case can be read as endorsing this dubious proposition. Today's result will prove particularly unfortunate if it is extended to govern Title VII cases.

Accordingly, accepting the Court's assertion that it is necessary to reach the statutory issue, I would hold that petitioners have not met their burden of proof and affirm the judgment of the Court of Appeals.

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[13] *United States* v. *City of Chicago*, 385 F. Supp. 543, 555–556 (ND Ill. 1974) (police department); *Officers for Justice* v. *CSC*, 371 F. Supp. 1328, 1337 (ND Cal. 1973) (police department); *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131, 1148–1149 (ND Ohio 1973) (police department), aff'd in part and rev'd in part on other grounds, 520 F. 2d 492 (CA6 1975); *Harper* v. *Mayor of Baltimore*, 359 F. Supp. 1187, 1202–1203 (Md.) (fire department), modified and aff'd, 486 F. 2d 1134 (CA4 1973); *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084, 1090–1091 (ED Pa. 1972) (police department), aff'd in pertinent part and vacated in part, 473 F. 2d 1029 (CA3 1973).

Syllabus

FEDERAL POWER COMMISSION *v.* CONWAY CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-342. Argued April 21, 1976—Decided June 7, 1976

An Arkansas public utility company (hereinafter Company) that makes wholesale interstate electricity sales, as well as retail industrial sales in competition with some of its wholesale customers (including respondents, seven municipally owned electric systems and two cooperatives, operating within Arkansas) filed a wholesale rate increase with the Federal Power Commission (FPC). Respondents sought to intervene before the FPC, urging that the increase be rejected on the ground that it was "an attempt to squeeze [respondents] . . . out of competition and make them more susceptible to the persistent efforts of the Company to take over the publicly owned systems in the State." The FPC allowed only limited intervention, excluding the alleged anticompetitive activities as outside the FPC's jurisdiction, which does not reach retail sales. The Court of Appeals on review took a contrary position, holding that the Company's retail rates "in a market in which it is competing with its own customers are part of the factual context in which the proposed wholesale rate will function . . ." and should be considered in determining whether or not the rate increase was just and reasonable. *Held:* The FPC's jurisdiction to review a petition to set aside or reduce a public utility's wholesale electric rate increase permits consideration of the utility's alleged purpose to forestall its customers from competing with it at retail. Pp. 276-282.

(a) Though the Federal Power Act confers jurisdiction on the FPC with respect to the sale of electric energy at wholesale in interstate commerce, and the FPC has no authority to correct an alleged discriminatory relationship between wholesale and retail rates by regulating the nonjurisdictional, retail price, § 205 (b) of the Act forbids the maintenance of any "unreasonable difference in rates" or service "with respect to any . . . sale" subject to the FPC's jurisdiction, and a jurisdictional sale is necessarily implicated in respondents' charge that the difference between the Company's wholesale and retail rates is unreason-

able and anticompetitive. To the extent that the alleged discrimination is traceable to the jurisdictional rate § 205 (b) would apply, and the FPC would have remedial power over the jurisdictional rate under § 206. Pp. 276–277.

(b) Ratemaking is not an exact science and there is no single cost-recovering rate: one rate as related to another may be discriminatory, although each rate if considered independently might fall within the zone of reasonableness. When the intrazonal relationship unduly favors one rate, the discrimination must be removed. Pp. 277–279.

(c) While the FPC lacks authority to fix retail rates, it may take those rates into account when it fixes the rates for interstate wholesale sales that are subject to its jurisdiction. Cf. *Panhandle Co.* v. *FPC*, 324 U. S. 635, 646. Pp. 279–282.

167 U. S. App. D. C. 43, 510 F. 2d 1264, affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Allan Abbot Tuttle argued the cause for petitioner. With him on the briefs were *Drexel D. Journey* and *Robert W. Perdue.*

Robert C. McDiarmid argued the cause for respondents Conway Corp. et al. With him on the brief was *Sandra J. Strebel. Harry A. Poth, Jr.,* and *Robert T. Hall III* filed briefs for Arkansas Power & Light Co. as respondent under this Court's Rule 21 (4).*

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case is this: When a power company that sells electricity at both wholesale and retail seeks to raise its wholesale rates, does the Federal Power Commission (Commission) have jurisdiction to consider the allegations of the company's wholesale customers

*Briefs of *amici curiae* urging affirmance were filed by *Northcutt Ely* and *Frederick H. Ritts* for the American Public Power Assn.; and by *Charles F. Wheatley, Jr.,* and *Grace Powers Monaco* for the City of Batavia, Ill., et al.

that the proposed wholesale rates, which are within the Commission's jurisdiction, are discriminatory and noncompetitive when considered in relation to the company's retail rates, which are not within the jurisdiction of the Commission? We hold that it does.

I

Arkansas Power & Light Co. (Company) is a public utility engaged in the sale of electric energy at wholesale in interstate commerce under the meaning of § 201 of the Federal Power Act (Act), as added, 49 Stat. 847, 16 U. S. C. § 824. Its wholesale rates are thus within reach of the Commission's powers under § 206 (a) of the Act to establish rates which are just, reasonable, and nondiscriminatory. 16 U. S. C. § 824e (a).[1] The Company also sells at retail and seeks industrial sales in competition with some of its wholesale customers. These wholesale customers include the seven municipally owned

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[1] Section 206 (a) provides:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." 49 Stat. 852, 16 U. S. C. § 824e (a).

Section 205 (b) forbids rates that are preferential or discriminatory:

"No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 49 Stat. 851, 16 U. S. C. § 824d (b).

electric systems and the two electric power cooperatives which are respondents here.[2] Each of these respondents (Customers) operates in the State of Arkansas and each borders on or is surrounded by the territory served by the Company.

In June 1973, the Company filed with the Commission a wholesale rate increase pursuant to § 205 (d).[3] The Customers sought to intervene before the Commission, urging that the rate increase be rejected. Among other grounds, it was asserted that the Customers and the Company were in competition for industrial retail accounts and that the rate increase was "an attempt to squeeze [the Customers] or some of them out of competition and to make them more susceptible to the persistent attempts of the company to take over the public[ly] owned systems in the State." App. 6. It was alleged that the proposed wholesale rates would make it "impossible for the [Customers] to sell power to an industrial load of any size at a competitive price with [the

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[2] The respondent customers are Conway Corp. (Conway, Ark.); Benton Municipal Light & Water Works; Hope Water & Light Commission; city of North Little Rock; city of Osceola; city of Prescott; city of West Memphis; Farmers Electric Cooperative Corp.; and Mississippi County Electric Cooperative, Inc.

[3] Section 205 (d) provides:

"Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 49 Stat. 851, 16 U. S. C. § 824d (d).

Company], since, in many cases, the revenues therefrom would not even cover the incremental power costs to [the Customers]." *Id.*, at 7. It was also asserted that the rate filing was "plainly discriminatory against the single class of customer which [the Company] has historically attempted to drive out of business, without justification on any ordinary cost of service basis . . . ." *Id.*, at 19.

The Company opposed the petition. The Commission permitted the Customers to intervene but ruled that it would "limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities" because the Customers had failed to demonstrate that the relief sought was "within this Commission's authority to direct." *Id.*, at 35. The Commission also denied the Customers' amended petition to intervene, again refusing to consider the tendered anticompetitive and discrimination issues. Inasmuch as the Commission's authority is limited to wholesale rates and does not reach sales at retail, the Commission's opinion was that "the relief sought by [the Customers] is beyond the authority granted to us under the Federal Power Act." *Id.*, at 53. In later denying the Customers' petition for rehearing, the Commission stated that in considering the Company's cost base for its proposed wholesale rates, it would of course put aside those costs properly allocable to the Company's retail business; but it again ruled that the anticompetitive issue presented by the Customers was "beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of the [Company's] proposed wholesale rates." *Id.*, at 55.

The Customers sought review of the Commission's action in the Court of Appeals for the District of Columbia Circuit. The Court of Appeals, disagreeing with the Commission's view as to the reach of its powers, held

that the Commission's jurisdiction over wholesale rates for electricity sold in interstate commerce furnished the necessary authority to consider the alleged discriminatory and anticompetitive effects of the requested increase. The Company's retail rates, the court held, "in a market in which it is competing with its own customers are part of the factual context in which the proposed wholesale rate will function . . ." and should be considered in determining whether or not the rate increase was just and reasonable. 167 U. S. App. D. C. 43, 52, 510 F. 2d 1264, 1273 (1975). The case was therefore remanded to the Commission for further proceedings.

We granted the Commission's petition for certiorari to consider the question whether the Court of Appeals had correctly construed the statutes controlling the Commission's jurisdiction. 423 U. S. 945 (1975). We now affirm the judgment of the Court of Appeals.

II

Section 201 (b) of the Act, 16 U. S. C. § 824 (b), confers jurisdiction on the Commission with respect to the sale of electric energy at wholesale in interstate commerce.[4] The prohibition against discriminatory or preferential rates or services imposed by § 205 (b) and the Commission's power to set just and reasonable rates under § 206 (a) are accordingly limited to sales "subject to the jurisdiction of the Commission," that is, to sales of electric energy at wholesale. The Commission has no power to prescribe the rates for retail sales of power companies. Nor, accordingly, would it have power to remedy

[4] Section 201 (b) provides in relevant part:

"The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."

an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates.

As the Commission is at great pains to establish, this is the proper construction of the Act, the legislative history of § 205 indicating that the section was expressly limited to jurisdictional sales to foreclose the possibility that the Commission would seek to correct an alleged discriminatory relationship between wholesale and retail rates by raising or otherwise regulating the nonjurisdictional, retail price.[5] Insofar as we are advised, no party to this case contends otherwise.

Building on this history, the Commission makes a skillful argument that it may neither consider nor remedy *any* alleged discrimination resting on a difference between jurisdictional and nonjurisdictional rates. But the argument, in the end, is untenable. Section 205 (b) forbids the maintenance of any "unreasonable difference in rates" or service "with respect to any . . . sale subject to the jurisdiction of the Commission." A jurisdictional sale is necessarily implicated in any charge that the difference between wholesale and retail rates is unreasonable or anticompetitive. If the undue preference or discrimination is in any way traceable to the level of the jurisdictional rate, it is plain enough that the section would to that extent apply; and to that extent the Commission would have power to effect a remedy under § 206 by an appropriate order directed to the jurisdictional rate. This was the view of the Court of Appeals, and we agree with it.

The Commission appears to insist that a just and rea-

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[5] Under the Act to Regulate Commerce of 1887, it was held that the Interstate Commerce Commission was empowered to order that a nonjurisdictional, intrastate freight rate be raised to eliminate a discrimination. *Houston & Texas R. Co.* v. *United States*, 234 U. S. 342, 356–359 (1914).

sonable wholesale rate can never be a contributing factor to an undue discrimination: Once the jurisdictional rate is determined to be just and reasonable, inquiry into discrimination is irrelevant for § 206 (a) purposes, for if the discrimination continues to exist, it is traceable wholly to the nonjurisdictional, retail rate. This argument assumes, however, that ratemaking is an exact science and that there is only one level at which a wholesale rate can be said to be just and reasonable and that any attempt to remedy a discrimination by lowering the jurisdictional rate would always result in an unjustly low rate that would fail to recover fully allocated wholesale costs. As the Court of Appeals pointed out and as this Court has held, however, there is no single cost-recovering rate, but a zone of reasonableness: "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high." *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, 251 (1951). The Commission itself explained the matter in *In re Otter Tail Power Co.*, 2 F. P. C. 134, 149 (1940):

> "It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate *per se*, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed."

The Commission thus cannot so easily satisfy its obligation to eliminate unreasonable discriminations or put aside its duty to consider whether a proposed rate will

have anticompetitive effects. The exercise by the Commission of powers otherwise within its jurisdiction "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . directives contained in §§ 205, 206 . . . ." *Gulf States Util. Co.* v. *FPC*, 411 U. S. 747, 758–759 (1973). The Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect.

We think the Court of Appeals was quite correct in concluding:

> "When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers." 167 U. S. App. D. C., at 53, 510 F. 2d, at 1274. (Footnote omitted.)

Because the Commission had raised a jurisdictional barrier and refused to consider or hear evidence concerning the Customers' allegations, the Court of Appeals could not determine whether a wholesale rate, if set low enough partially or wholly to abolish any discriminatory effects found to exist, would fail to recover wholesale costs. The case was therefore remanded to the Commission for further proceedings.

We agree with this disposition. It does not invade a nonjurisdictional area. The remedy, if any, would operate only against the rate for jurisdictional sales. Whether

that rate would be affected at all would involve, as the Court of Appeals indicated, an examination of the entire "factual context in which the proposed wholesale rate will function." *Id.*, at 52, 510 F. 2d, at 1273. These facts will naturally include those related to nonjurisdictional transactions, but consideration of such facts would appear to be an everyday affair. As the Commission concedes, in determining whether the proposed wholesale rates are just and reasonable, it would in any event be necessary to determine which of the Company's costs are allocable to its nonjurisdictional, retail sales and which to its jurisdictional, wholesale sales—this in order to insure that the wholesale rate is paying its way, but no more. In this sense, consideration of the relationship between jurisdictional and nonjurisdictional rate structures is commonplace, and is nothing more than is required by *Colorado Interstate Co.* v. *FPC*, 324 U. S. 581 (1945),[6] and by *Panhandle Co.* v. *FPC*, 324 U. S. 635 (1945).[7]

[6] "The function which an allocation of costs (including return) is designed to perform in a rate case of this character is clear. The amount of gross revenue from each class of business is known. Some of those revenues are derived from sales at rates which the Commission has no power to fix. The other part of the gross revenues comes from the interstate wholesale rates which are under the Commission's jurisdiction. The problem is to allocate to each class of the business its fair share of the costs. It is of course immaterial that the revenues from the intrastate sales or the direct industrial sales may exceed their costs, since the authority to regulate those phases of the business is lacking. To the extent, however, that the revenues from the interstate wholesale business exceed the costs allocable to that phase of the business, the interstate wholesale rates are excessive." 324 U. S., at 588.

[7] "We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Com-

Furthermore, § 206 (a) provides that whenever the Commission finds that

> "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification* is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." (Emphasis added.)

The rules, practices, or contracts "affecting" the jurisdictional rate are not themselves limited to the jurisdictional context. In the *Panhandle* case, *supra,* decided under the almost identical provision of the Natural Gas Act, 15 U. S. C. § 717d (a), the Court emphasized the same aspect of the section, and went on to hold that because it was "clear" that a gas company's "contracts covering direct industrial sales" are contracts "affecting" jurisdictional rates,

> "[t]he Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for inter-

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mission would transgress the jurisdictional lines which Congress wrote into the Act. The Commission recognizes this necessity. As it stated in *Re Cities Service Gas Co.*, 50 P. U. R. (N. S.) 65, 89: 'The company's facilities and operations are devoted in part to natural gas service which is not subject to our jurisdiction. This service consists principally of gas sales made directly to large industrial consumers. The necessity arises, therefore, for making an allocation of costs as between the jurisdictional and non-jurisdictional sales.' The question is whether a formal allocation was necessary under the exceptional circumstances of this case." 324 U. S., at 641–642. (Footnote omitted.)

state wholesale sales which are subject to its jurisdiction." 324 U. S., at 646.[8]

The Court of Appeals' construction of the Act is sound and its judgment is affirmed.

So ordered.

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[8] For the proposition that there is no room within the Act to consider any discriminatory or anticompetitive relationship between a jurisdictional and a nonjurisdictional rate, the Commission relies upon the statement in the concurring opinion of Mr. Justice Jackson in *Colorado Interstate Co.* v. *FPC*, 324 U. S., at 615: "It is true that the Natural Gas Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and unregulated ones." But the Justice went on to make clear that a nonjurisdictional price could be used in determining what is the "just and reasonable" jurisdictional rate. "By use of the unregulated price as a basis for comparison I think a reduction in the wholesale rates for resale to the public is in order. If this makes low price industrial business less desirable, it will be in the long-range public interest for reasons more fully stated by me in [*FPC* v. *Hope Gas Co.*, 320 U. S. 591 (1944)]." *Ibid.*

CITY OF CHARLOTTE ET AL. *v.* LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-250. Argued March 3, 1976—Decided June 7, 1976

Petitioner city's refusal to withhold from the paychecks of its firemen dues owing their union, which represents about 351 of the 543 uniformed members of the fire department, *held* not to violate the Equal Protection Clause of the Fourteenth Amendment. Such refusal must meet only the standard of reasonableness, and this standard is satisfied by the city's offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method for avoiding the burden of withholding money for all persons or organizations that request a checkoff. Pp. 286-289.

518 F. 2d 83, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a statement concurring in the judgment, *post*, p. 289.

William A. Watts argued the cause for petitioners. With him on the brief was *Henry W. Underhill, Jr.*

Jonathan Wallas argued the cause for respondents. With him on the brief were *J. LeVonne Chambers* and *Adam Stein.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The city of Charlotte, N. C., refuses to withhold from the paychecks of its firefighters dues owing to their

**William M. Acker, Jr.*, and *Ezra B. Perry, Jr.*, filed a brief for Mel Bailey, Sheriff of Jefferson County, Ala., as *amicus curiae* urging reversal.

union, Local 660, International Association of Firefighters. We must decide whether this refusal violates the Equal Protection Clause of the Fourteenth Amendment.

I

Local 660 represents about 351 of the 543 uniformed members of the Charlotte Fire Department. Since 1969 the union and individual members have repeatedly requested the city to withhold dues owing to the union from the paychecks of those union members who agree to a checkoff. The city has refused each request. After the union learned that it could obtain a private group life insurance policy for its membership only if it had a dues checkoff agreement with the city, the union and its officers filed suit in federal court alleging, *inter alia*, that the city's refusal to withhold the dues of union members violated the Equal Protection Clause of the Fourteenth Amendment.[1] The complaint asserted that

[1] Respondents brought suit under 42 U. S. C. § 1983, grounding jurisdiction in 28 U. S. C. §§ 1331 and 1343. As the Court of Appeals noted, insofar as the suit was brought against the city of Charlotte and the Charlotte City Council, the District Court was without jurisdiction under § 1343 since a municipal corporation is not a "person" within the meaning of § 1983. *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973). We need not decide whether respondents' allegation of $10,000 in damages was sufficient to confer § 1331 jurisdiction over the city and city council, see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971); *Bell* v. *Hood*, 327 U. S. 678 (1946); Note, 89 Harv. L. Rev. 922 (1976), since respondents also sued the individual members of the city council and the District Court unquestionably had jurisdiction under § 1343 to consider those claims. See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972). For convenience, we shall refer to all the petitioners collectively as the "city."

The District Court granted the city's motion to dismiss the complaint with respect to the union, the Court of Appeals affirmed, and certiorari was not sought on this ruling. Relief was granted only to the union officers who, in their capacity as city employees, had been denied a dues checkoff.

since the city withheld amounts from its employees' paychecks for payment to various other organizations, it could not arbitrarily refuse to withhold amounts for payment to the union.

On cross-motions for summary judgment, the District Court for the Western District of North Carolina ruled against the city. The court determined that, although the city had no written guidelines, its "practice has been to allow check offs from employees' pay to organizations or programs as required by law or where the check off option is available to all City employees or where the check off option is available to all employees within a single employee unit such as the Fire Department." 381 F. Supp. 500, 502 (1974). The court further found that the city has "not allowed check off options serving only single employees or programs which are not available either to all City employees or to all employees engaged in a particular section of City employment." *Ibid.* Finding, however, that withholding union dues from the paychecks of union members would be no more difficult than processing any other deduction allowed by the city, the District Court concluded that the city had not offered a rational explanation for its refusal to withhold for the union. Accordingly, the District Court held that the city's refusal to withhold moneys when requested to do so by the respondents for the benefit of Local 660 "constitutes a violation of the individual [respondents'] rights to equal protection of laws under the Fourteenth Amendment." *Id.*, at 502–503. The court ordered that so long as the city continued "without clearly stated and fair standards, to withhold moneys from the paychecks of City employees for other purposes," it was enjoined from refusing to withhold union dues from the paychecks of the respondents. *Id.*, at 503. The Court of Appeals for the Fourth Circuit affirmed, 518 F. 2d 83 (1975), and we granted certiorari. 423 U. S. 890 (1975). We reverse.

II

Since it is not here asserted—and this Court would reject such a contention if it were made—that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause, the city's practice must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny.[2]

The city presents three justifications for its refusal to allow the dues checkoff requested by respondents. First, it argues, North Carolina law makes it illegal for the city to enter into a contract with a municipal union, N. C. Gen. Stat. § 95–98 (1975), and an agreement with union members to provide a dues checkoff, with the union as a third-party beneficiary, would in effect be such a contract. See 40 N. C. Op. Atty. Gen. 591 (1968–1970). Thus, compliance with the state law, and with the public policy it represents of discouraging dealing with municipal unions, is said to provide a sufficient basis for refusing respondents' request. Second, it claims, a dues checkoff is a proper subject of collective bargaining, which the city asserts Congress may shortly require of state and local governments. Under this theory, the desire to preserve the checkoff as a bargaining chip in any future collective-bargaining process is in itself an adequate basis for the refusal. Lastly, the city contends, allowing withholding only when it benefits all city or departmental employees is a legitimate method for avoiding the burden of withholding money for all persons or organizations that request a checkoff. Because we find that this explanation provides a sufficient justification for

[2] *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 253–254 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330, 335 (1972); *Kramer* v. *Union School Dist.*, 395 U. S. 621, 626 (1969); *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968).

the challenged practice, we have no occasion to address the first two reasons proffered.

The city submitted affidavits to show that it would be unduly burdensome and expensive for it to withhold money for every organization or person that requested it, App. 17, 45, 55, and respondents did not contest this showing. As respondents concede, it was therefore reasonable, and permissible under the Equal Protection Clause, for the city to develop standards or restrictions to determine who would be eligible for withholding. *Mathews* v. *Diaz, ante,* at 82–83. See Brief for Respondents 9. Within the limitations of the Equal Protection Clause, of course, the choice of those standards is for the city and not for the courts. Thus, our inquiry is not whether standards might be drawn that would include the union but whether the standards that were drawn were reasonable ones with "some basis in practical experience." *South Carolina* v. *Katzenbach,* 383 U. S. 301, 331 (1966). Of course, the fact that the standards were drawn and applied in practice rather than pursuant to articulated guidelines is of no import for equal protection purposes.

The city allows withholding for taxes, retirement-insurance programs, savings programs, and certain charitable organizations.[3] These categories, the District

[3] The following payroll deductions are required by law: (a) federal income tax; (b) state income tax; (c) North Carolina Firemen's Retirement System; (d) North Carolina Local Government Employees Retirement System; (e) city, county, and state tax levies.

The following deductions are permitted for all city employees: (a) United States Savings Bonds; (b) medical and life insurance; (c) Aetna Deferred Compensation Plan (a savings program); (d) United Way.

The following deductions are permitted for all firemen: (a) Firemen's Benefit Fund (a group life insurance program); (b) Firemen's Credit Union (a savings and loan program); (c) Firemen's Voluntary Pledge Fund (a special withholding providing benefits to the survivors of deceased firemen).

Court found, are those in which the checkoff option can, or must, be availed of by all city employees, or those in an entire department. Although the District Court found that this classification did not present a rational basis for rejecting respondents' requests, 381 F. Supp., at 502, we disagree. The city has determined that it will provide withholding only for programs of general interest in which all city or departmental employees can, without more, participate. Employees can participate in the union checkoff only if they join an outside organization—the union. Thus, Local 660 does not fit the category of groups for which the city will withhold. We cannot say that denying withholding to associational or special interest groups that claim only some departmental employees as members and that employees must first join before being eligible to participate in the checkoff marks an arbitrary line so devoid of reason as to violate the Equal Protection Clause. Rather, this division seems a reasonable method for providing the benefit of withholding to employees in their status as employees, while limiting the number of instances of withholding and the financial and administrative burdens attendant thereon.

Given the permissibility of creating standards and the reasonableness of the standards created, the District Court's conclusion that it would be no more difficult for the city to withhold dues for the union than to process other deductions is of no import. We may accept, *arguendo*, that the difficulty involved in processing any individual deduction is neither great nor different in kind from that involved in processing any other deduction. However, the city has not drawn its lines in order to exclude individual deductions, but in order to avoid the cumulative burden of processing deductions every time a request is made; and inherent in such a line-drawing process are difficult choices and "some harsh and apparently arbitrary consequences . . . ." *Mathews* v. *Diaz*,

ante, at 83. See *ante,* at 82–84; *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970). Cf. *Schilb* v. *Kuebel,* 404 U. S. 357, 364 (1971); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955).

Respondents recognize the legitimacy of such a process and concede that the city "is free to develop fair and reasonable standards to meet any possible cost problem." Brief for Respondents 9. Respondents have wholly failed, however, to present any reasons why the present standards are not fair and reasonable—other than the fact that the standards exclude them. This fact, of course, is insufficient to transform the city policy into a constitutional violation. Since we find a reasonable basis for the challenged classification, the judgment of the Court of Appeals for the Fourth Circuit must be reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART concurs in the judgment upon the ground that the classification challenged in this case is not invidiously discriminatory and does not, therefore, violate the Equal Protection Clause of the Fourteenth Amendment.

NADER *v.* ALLEGHENY AIRLINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-455. Argued March 24, 1976—Decided June 7, 1976

Shortly before his scheduled departure from Washington, D. C., to Connecticut, where he was to fulfill speaking engagements, petitioner, who had reserved a seat on one of respondent's Hartford flights arrived at the check-in area but was advised that he could not be accommodated because all the seats were occupied. After refusing the tender of respondent, which concededly overbooked the flight, of denied boarding compensation, petitioner brought a common-law action against respondent based on an alleged fraudulent misrepresentation arising from respondent's failure to apprise petitioner of its deliberate overbooking practices, and a statutory action under § 404 (b) of the Federal Aviation Act of 1958, arising from respondent's failure to afford petitioner the boarding priority specified in its rules filed with the Civil Aeronautics Board (CAB). The District Court entered judgment and awarded compensatory and punitive damages on both claims. The Court of Appeals remanded petitioner's statutory claim for further findings and reversed the award of punitive damages on that claim. The question of punitive damages for the common-law claim was remanded for further findings on respondent's good faith. None of that court's foregoing rulings was presented in the petition for certiorari. The court also held that the common-law fraudulent misrepresentation claim had to be remanded to the District Court and stayed, under the principles of primary jurisdiction, pending referral to the CAB to determine whether the alleged failure to disclose the practice of deliberate overbooking is a deceptive practice under § 411 of the Act, which provides that the CAB may investigate and determine whether any air carrier has been or is engaged in unfair or deceptive practices, and that practices found to violate the section shall be the subject of a cease-and-desist order. The court held that a CAB determination that a practice is not deceptive under § 411 would preclude a common-law tort action for damages for injuries caused by that practice. *Held:* Petitioner's common-law tort action based on

the alleged fraudulent misrepresentation by respondent air carrier should not be stayed pending reference to the CAB for a determination whether the practice is "deceptive" within the meaning of § 411 of the Act. Pp. 298–308.

(a) There is no irreconcilable conflict between the Act's scheme and the common-law remedy; both may coexist as contemplated by the Act's saving clause, which provides that "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." § 1106. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, distinguished. Pp. 298–300.

(b) No power to immunize a carrier from common-law liability can be inferred from § 411's language; where Congress has sought to confer such power it has done so expressly, as in § 414 of the Act. Section 411 is both broader and narrower than common-law remedies. A cease-and-desist order may issue thereunder if the CAB concludes that a carrier is engaged in an unfair or deceptive practice, and no findings that the practice was intentionally deceptive or has caused injury in fact are necessary; on the other hand, a CAB decision that such an order is inappropriate does not manifest the CAB's approval of the practice but may merely represent the agency's conclusion that a more flexible approach is necessary. Pp. 300–303.

(c) The doctrine of primary jurisdiction, which has been applied where a claim originally cognizable in the courts requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative agency, is inapplicable here where petitioner's action for respondent's asserted failure to disclose its overbooking practices implicates no tariff practice or similar technical question of fact uniquely within the CAB's expertise. Pp. 303–307.

167 U. S. App. D. C. 350, 512 F. 2d 527, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, *post*, p. 308.

Reuben B. Robertson III argued the cause for petitioner. With him on the briefs was *Alan B. Morrison.*

E. Barrett Prettyman, Jr., argued the cause for re-

spondent. With him on the briefs were *Frank F. Roberson* and *William A. Bradford, Jr.**

MR. JUSTICE POWELL delivered the opinion of the Court.

In this case we address the question whether a common-law tort action based on alleged fraudulent misrepresentation by an air carrier subject to regulation by the Civil Aeronautics Board (Board) must be stayed pending reference to the Board for determination whether the practice is "deceptive" within the meaning of § 411 of the Federal Aviation Act of 1958, 72 Stat. 769, 49 U. S. C. § 1381. We hold that under the circumstances of this case a stay pending reference is inappropriate.

I

The facts are not contested. Petitioner agreed to make several appearances in Connecticut on April 28, 1972, in support of the fundraising efforts of the Connecticut Citizen Action Group (CCAG), a nonprofit public interest organization. His two principal appearances were to be at a noon rally in Hartford and a later address at the Storrs campus of the University of Connecticut. On April 25, petitioner reserved a seat on respondent's flight 864 for April 28. The flight was scheduled to leave Washington, D. C., at 10:15 a. m. and to arrive in Hartford at 11:15 a. m. Petitioner's ticket was purchased from a travel agency on the morning of the flight. It indicated, by the standard "OK" notation, that the reservation was confirmed.

Petitioner arrived at the boarding and check-in area approximately five minutes before the scheduled depar-

**Donald C. Comlish* and *Robert Glasser* filed a brief for the Air Transport Association of America as *amicus curiae*.

ture time. He was informed that all seats on the flight were occupied and that he, like several other passengers who had arrived shortly before him, could not be accommodated. Explaining that he had to arrive in Hartford in time for the noon rally, petitioner asked respondent's agent to determine whether any standby passengers had been allowed to board by mistake or whether anyone already on board would voluntarily give up his or her seat. Both requests were refused. In accordance with respondent's practice, petitioner was offered alternative transportation by air taxi to Philadelphia, where connections could be made with an Allegheny flight scheduled to arrive in Hartford at 12:15 p. m. Fearing that the Philadelphia connection, which allowed only 10 minutes between planes, was too close, petitioner rejected this offer and elected to fly to Boston, where he was met by a CCAG staff member who drove him to Storrs.

Both parties agree that petitioner's reservation was not honored because respondent had accepted more reservations for flight 864 than it could in fact accommodate. One hour prior to the flight, 107 reservations had been confirmed for the 100 seats actually available. Such overbooking is a common industry practice, designed to ensure that each flight leaves with as few empty seats as possible despite the large number of "no-shows"—reservation-holding passengers who do not appear at flight time. By the use of statistical studies of no-show patterns on specific flights, the airlines attempt to predict the appropriate number of reservations necessary to fill each flight. In this way, they attempt to ensure the most efficient use of aircraft while preserving a flexible booking system that permits passengers to cancel and change reservations without notice or penalty. At times the practice of overbooking results

in oversales, which occur when more reservation-holding passengers than can be accommodated actually appear to board the flight. When this occurs, some passengers must be denied boarding ("bumped"). The chance that any particular passenger will be bumped is so negligible that few prospective passengers aware of the possibility would give it a second thought. In April 1972, the month in which petitioner's reservation was dishonored, 6.7 confirmed passengers per 10,000 enplanements were denied boarding on domestic flights.[1] For all domestic airlines, oversales resulted in bumping an average of 5.4 passengers per 10,000 enplanements in 1972, and 4.6 per 10,000 enplanements in 1973.[2] In domestic operations respondent oversold 6.3 seats per 10,000 enplanements in 1972 and 4.5 seats per 10,000 enplanements in 1973.[3] Thus, based on the 1972 experience of all domestic airlines, there was only slightly more than one chance in 2,000 that any particular passenger would be bumped on a given flight.[4] Nevertheless, the total number of confirmed ticket holders denied seats is quite substantial, numbering over 82,000 passengers in 1972 and about 76,000 in 1973.[5]

Board regulations require each airline to establish priority rules for boarding passengers and to offer "denied boarding compensation" to bumped passengers. These "liquidated damages" are equal to the value of the passenger's ticket with a $25 minimum and a $200 maximum. 14 CFR § 250.5 (1975). Passengers are free to reject the compensation offered in favor of a common-

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[1] Brief for Civil Aeronautics Board as *Amicus Curiae* filed in Court of Appeals, App. B, p. 58.

[2] *Id.*, at 50

[3] *Id.*, at 51.

[4] On any given flight, of course, the chance that a passenger will be bumped may be higher or lower than the overall average.

[5] *Id.*, at 50.

law suit for damages suffered as a result of the bumping. Petitioner refused the tender of denied boarding compensation ($32.41 in his case) and, with CCAG, filed this suit for compensatory and punitive damages. His suit did not seek compensation for the bumping *per se* but asserted two other bases of liability: a common-law action based on fraudulent misrepresentation arising from respondent's alleged failure to inform petitioner in advance of its deliberate overbooking practices, and a statutory action under § 404 (b) of the Act, 49 U. S. C. § 1374 (b),[6] arising from respondent's alleged failure to afford petitioner the boarding priority specified in its rules filed with the Board under 14 CFR § 250.3 (1975).

The District Court entered a judgment for petitioner on both claims, awarding him a total of $10 in compensatory damages and $25,000 in punitive damages. Judgment also was entered for CCAG on its misrepresentation claim, with an award of $51 in compensatory damages and $25,000 in punitive damages.

The Court of Appeals for the District of Columbia Circuit reversed. 167 U. S. App. D. C. 350, 512 F. 2d 527 (1975). A number of its rulings were not presented to this Court in the petition for certiorari. The award of damages to CCAG was reversed on the ground that the organization was too "remote from the transaction" to fall "within the class of persons who may recover." *Id.*, at 372, 512 F. 2d, at 549. The merits of petitioner's statutory claim were remanded for fur-

[6] Section 404 (b) provides:

"No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

ther findings. The award of punitive damages to petitioner on the statutory claim was reversed on the ground that respondent's conduct contained no "elements of intentional wrongdoing or conscious disregard for" petitioner's rights. *Id.*, at 373, 512 F. 2d, at 550. The question of punitive damages for the common-law claim was remanded for further findings on respondent's good faith. In particular, the trial court was to consider "whether Allegheny reasonably believed that its policies were completely lawful and in fact carried the approval of the Board." *Id.*, at 374, 512 F. 2d, at 551. None of these rulings was presented to this Court in the petition for certiorari.

The only issue before us concerns the Court of Appeals' disposition on the merits of petitioner's claim of fraudulent misrepresentation. Although the court rejected respondent's argument that the existence of the Board's cease-and-desist power under § 411 of the Act eliminates all private remedies for common-law torts arising from unfair or deceptive practices by regulated carriers, it held that a determination by the Board that a practice is not deceptive within the meaning of § 411 would, as a matter of law, preclude a common-law tort action seeking damages for injuries caused by that practice.[7] Therefore, the court held that the Board must be

[7] Section 411 provides in full:

"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

allowed to determine in the first instance whether the challenged practice (in this case, the alleged failure to disclose the practice of overbooking) falls within the ambit of § 411. The court took judicial notice that a rulemaking proceeding concerning possible changes in reservation practices in response to the 1973–1974 fuel crisis was already underway and that a challenge to the carriers' overbooking practices had been raised by an intervenor in that proceeding.[8] The District Court was instructed to stay further action on petitioner's misrepresentation claim pending the outcome of the rulemaking proceeding. The Court of Appeals characterized its holding as "but another application of the principles of primary jurisdiction, a doctrine whose purpose is the coordination of the workings of agency and court." 167 U. S. App. D. C., at 367, 512 F. 2d, at 544.

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[8] The rulemaking proceedings were initiated in January 1974. Emergency Reservation Practices Investigation, 39 Fed. Reg. 823 (1974) (CAB Order 73–12–93, EDR–260). An opinion and an order were issued on April 13, 1976. Emergency Reservation Practices Investigation (CAB Order 76–4–55). The Board concluded that the questions raised by the Court of Appeals in this case were "outside the scope of [the] investigation." *Id.*, at 7. It specifically noted that "the question of whether intentional overbooking, in general, or nondisclosure of such practice, in particular, is a deceptive trade practice" was not at issue. *Id.*, at 8.

In April 1976 the Board announced a proposed rulemaking proceeding with respect to deliberate overbooking and oversales. Priority Rules, Denied-Boarding Compensation Tariffs and Reports of Unaccommodated Passengers: Reexamination of the Board's Policies Concerning Deliberate Overbooking and Oversales, 41 Fed. Reg. 16478 (1976) (CAB Order EDR–296). The Board has decided to re-evaluate existing practices in light of a recent "trend toward a higher rate of oversales" and in light of the fact that oversales "continue to be a significant cause of [consumer] complaints." *Ibid.* Among the options to be considered is a requirement that the practice of deliberate overbooking, if allowed to continue, be disclosed to customers. *Id.*, at 16479.

II

The question before us, then, is whether the Board must be given an opportunity to determine whether respondent's alleged failure to disclose its practice of deliberate overbooking is a deceptive practice under § 411 before petitioner's common-law action is allowed to proceed. The decision of the Court of Appeals requires the District Court to stay the action brought by petitioner in order to give the Board an opportunity to resolve the question. If the Board were to find that there had been no violation of § 411, respondent would be immunized from common-law liability.

A

Section 1106 of the Act, 49 U. S. C. § 1506, provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." The Court of Appeals found that "although the saving clause of section 1106 purports to speak in absolute terms it cannot be read so literally." 167 U. S. App. D. C., at 367, 512 F. 2d, at 544. In reaching this conclusion, it relied on *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). In that case, the Court, despite the existence of a saving clause virtually identical to § 1106, refused to permit a state-court common-law action challenging a published carrier rate as "unjust and unreasonable." The Court conceded that a common-law right, even absent a saving clause, is not to be abrogated "unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." 204 U. S., at 437. But the Court found that

the continuance of private damages actions attacking the reasonableness of rates subject to the regulation of the Interstate Commerce Commission would destroy the purpose of the Interstate Commerce Act, which was to eliminate discrimination by requiring uniform rates. The saving clause, the Court found, "cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*, at 446.[9]

In this case, unlike *Abilene*, we are not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies. In *Abilene* the carrier, if subject to both agency and court sanctions, would be put in an untenable position when the agency and a court disagreed on the reasonableness of a rate. The carrier could not abide by the rate filed with the Commission, as required by statute, and also comply with a court's determination that the rate was excessive. The conflict between the court's common-law authority and the agency's ratemaking power was direct and unambiguous. The court in the present case, in contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of a rate—or, indeed, on

[9] The Court later described the saving clause discussed in *Abilene* as follows:

"That proviso was added at the end of the statute,—not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections,—but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common law duties and the like." *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 129–130 (1915).

the reasonableness of any carrier practice. There is no Board requirement that air carriers engage in overbooking or that they fail to disclose that they do so. And any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental. Under the circumstances, the common-law action and the statute are not "absolutely inconsistent" and may coexist, as contemplated by § 1106.

B

Section 411 of the Act allows the Board, where "it considers that such action . . . would be in the interest of the public," "upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent," to "investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition . . . ." Practices determined to be in violation of this section "shall" be the subject of a cease-and-desist order. The Court of Appeals concluded—and respondent does not challenge the conclusion here—that this section does not totally preclude petitioner's common-law tort action. But the Court of Appeals also held, relying on the nature of the airline industry as "a regulated system of limited competition," *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U. S. 79, 84 (1956), and the Board's duty to promote "adequate, economical, and efficient service," § 102 (c) of the Act, 49 U. S. C. § 1302 (c), "at the lowest cost consistent with the furnishing of such service," § 1002 (e)(2) of the Act, 49 U. S. C. § 1482 (e)(2), that the Board has the power in a § 411 proceeding to approve practices that might otherwise be considered deceptive and thus to immunize carriers from common-law liability. 167 U. S. App. D. C., at 366, 512 F. 2d, at 543.

We cannot agree. No power to immunize can be derived from the language of § 411. And where Congress has sought to confer such power it has done so expressly, as in § 414 of the Act, 49 U. S. C. § 1384, which relieves those affected by certain designated orders (not including orders issued under § 411) "from the operations of the 'antitrust laws.'" When faced with an exemptive provision similar to § 414 in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), this Court dismissed an antitrust action because initial consideration by the agency had not been sought. The Court pointed out that the Act in question was "restrictive in its operation upon some of the activities of common carriers . . . , and permissive in respect of others." *Id.*, at 485. See also *Far East Conference* v. *United States*, 342 U. S. 570 (1952). Section 411, in contrast, is purely restrictive. It contemplates the elimination of "unfair or deceptive practices" that impair the public interest. Its role has been described in *American Airlines, Inc.* v. *North American Airlines, Inc., supra*, at 85:

> "'Unfair or deceptive practices or unfair methods of competition,' as used in § 411, are broader concepts than the common-law idea of unfair competition. . . . The section is concerned not with punishment of wrongdoing or protection of injured competitors, but rather with protection of the public interest."

As such, § 411 provides an injunctive remedy for vindication of the public interest to supplement the compensatory common-law remedies for private parties preserved by § 1106.[10]

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[10] Cf. *Federal Trade Comm'n* v. *Klesner*, 280 U. S. 19, 25–26 (1929); *Holloway* v. *Bristol-Myers Corp.*, 158 U. S. App. D. C. 207, 212, 485 F. 2d 986, 991 (1973) (both opinions discuss § 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U. S. C. § 45, which this Court, in *American Airlines, Inc.* v. *North*

Thus, a violation of § 411, contrary to the Court of Appeals' conclusion, is not coextensive with a breach of duty under the common law. We note that the Board's jurisdiction to initiate an investigation under § 411 is expressly premised on a finding that the "public interest" is involved. The Board "may not employ its powers to vindicate private rights." 351 U. S., at 83. Indeed, individual consumers are not even entitled to initiate proceedings under § 411, a circumstance that indicates that Congress did not intend to require private litigants to obtain a § 411 determination before they could proceed with the common-law remedies preserved by § 1106. Cf. *Rosado* v. *Wyman*, 397 U. S. 397, 406 (1970).

Section 411 is both broader and narrower than the remedies available at common law. A cease-and-desist order may issue under § 411 merely on the Board's conclusion, after an investigation determined to be in the public interest, that a carrier is engaged in an "unfair or deceptive practice." No findings that the practice was intentionally deceptive or fraudulent or that it in fact has caused injury to an individual are necessary. *American Airlines, Inc.* v. *North American Airlines, Inc.*, *supra*, at 86. On the other hand, a Board decision that a cease-and-desist order is inappropriate does not represent approval of the practice under investigation. It may merely represent the Board's conclusion that the serious prohibitory sanction of a cease-and-desist order is inappropriate, that a more flexible approach is necessary. A wrong may be of the sort that calls for compensation to an injured individual without requiring the extreme remedy of a cease-and-desist order. Indeed, the Board,

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American Airlines, Inc., 351 U. S., at 82, described as the model for § 411).

in dealing with the problem of overbooking by air carriers, has declined to issue cease-and-desist orders, despite the determination by an examiner in one case that a § 411 violation had occurred.[11] Instead, the Board has elected to establish boarding priorities and to ensure that passengers will be compensated for being bumped either by a liquidated sum under Board regulations or by resort to a suit for compensatory damages at common law.[12]

In sum, § 411 confers upon the Board a new and powerful weapon against unfair and deceptive practices that injure the public. But it does not represent the only, or best, response to all challenged carrier actions that result in private wrongs.

C

The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63 (1956). Even when common-law rights and remedies survive and the agency in question lacks the power to confer immunity from common-law liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure "[u]niformity and

[11] In the late 1950's, § 411 investigations were initiated against two carriers charged with deliberate overbooking. One of these investigations was terminated on the ground that the record showed no deliberate overbooking by the carrier. *Eastern Air Lines Overbooking Enforcement Proceeding*, 30 C. A. B. 862 (1960). The other was terminated, after a finding by the examiner of a § 411 violation, in favor of an industrywide investigation. *National Airlines, Inc., Enforcement Proceeding*, 31 C. A. B. 390 (1960).

[12] See nn. 15–18 and accompanying text, *infra*.

consistency in the regulation of business entrusted to a particular agency" or where

> "the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference* v. *United States,* 342 U. S., at 574–575.

See also *United States* v. *Western Pacific R. Co., supra,* at 64.

The doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency, *e. g., Danna* v. *Air France,* 463 F. 2d 407 (CA2 1972); *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.,* 360 U. S. 411, 417–418 (1959), particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency—such as matters turning on an assessment of industry conditions, *e. g., United States* v. *Western Pacific R. Co., supra,* at 66–67. In this case, however, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Board.

Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or Board regulation applicable to disclosure practices.[13] Petitioner also makes no chal-

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[13] In 1965, the Board proposed a rule requiring carriers to notify individual passengers of overbooked conditions 12 hours prior to the scheduled departure time. Passenger Priorities and Overbooked

lenge, comparable to those made in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp., supra,* and *Lichten* v. *Eastern Airlines, Inc.,* 189 F. 2d 939 (CA2 1951), to limitations on common-law damages imposed through exculpatory clauses included in a tariff.

Referral of the misrepresentation issue to the Board cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge," *United States* v. *Western Pacific R. Co., supra,* at 64, of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically

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Flights: Notice of Proposed Rule Making, 30 Fed. Reg. 13236 (1965) (CAB Order EDR–95). This proposal subsequently was abandoned after industry opposition on the ground that it was excessively rigid and unworkable. Priority Rules, Denied Boarding Compensation Tariffs, And Reports of Unaccommodated Passengers: Notice of Proposed Rule Making, 32 Fed. Reg. 459, 460–461 (1967) (CAB Order EDR–109).

The Board's abandonment of this proposal cannot be read as blanket approval of failure to make a public disclosure of overbooking practices. The cost of an individual notification program in terms of expense, public relations, and passenger confusion could be prohibitive. But alternative means of disclosure may be significantly less disruptive. Petitioner suggests, for example, that carrier overbooking practices be included in tariffs, which are required to be available for public inspection. And the Board has approved an innovative approach suggested by Eastern Air Lines, which provides for a system of limited overbooking in which passengers subject to possible denial of boarding are advised at the outset of their status. See *Delta Air Lines, Inc.* v. *CAB,* 147 U. S. App. D. C. 272, 455 F. 2d 1340 (1971) (aff'g CAB Order 71–6–120).

expert body is not likely to be helpful in the application of these standards to the facts of this case.[14]

We are particularly aware that, even where the wrong sought to be redressed is not misrepresentation but bumping itself, which has been the subject of Board consideration and for which compensation is provided in carrier tariffs, the Board has contemplated that there may be individual adjudications by courts in common-law suits brought at the option of the passenger. The present regulations dealing with the problems of overbooking and oversales were promulgated by the Board in 1967. They provide for denied boarding compensation to bumped passengers and require each carrier to establish priority rules for seating passengers and to file reports of passengers who could not be accommodated.[15] The order instituting these regulations contemplates that the bumped passenger will have a choice between accepting denied boarding compensation as "liquidated damages for all damages incurred . . . as a result of the carrier's failure to provide the passenger with confirmed reserved space," or pursuing his or her common-law remedies.[16] The Board specifically pro-

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[14] For example, if respondent's overbooking practices were detailed in its tariff and therefore available to the public, a court presented with a claim of misrepresentation based on failure to disclose need not make prior reference to the Board, as it should if presented with a suit challenging the reasonableness of practices detailed in a tariff. Rather, the court could, applying settled principles of tort law, determine that the tariff provided sufficient notice to the party who brought the suit—as, indeed, petitioner suggests it would. Reply Brief for Petitioner 3–4, n. 3.

[15] Priority Rules, Denied Boarding Compensation Tariffs and Reports of Unaccommodated Passengers, 32 Fed. Reg. 11939 (1967) (CAB Order ER–503). See 14 CFR § 250.1 *et seq.* (1975).

[16] CAB Order ER–503, *supra*, 32 Fed. Reg. 11943.

vided for a 30-day period before the specified compensation need be accepted so that the passenger will not be forced to make a decision before "the consequences of denied boarding have occurred and are known." [17] After evaluating the consequences, passengers may choose as an alternative "to pursue their remedy under the common law." [18]

III

We conclude that petitioner's tort action should not be stayed pending reference to the Board and accordingly the decision of the Court of Appeals on this issue is reversed. The Court of Appeals did not address the ques-

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[17] *Id.*, at 11942.

[18] Foreign Air Carriers: Priority Rules, Denied Boarding Compensation Tariffs and Reports of Unaccommodated Passengers, 38 Fed. Reg. 15083, 15084 (1973) (CAB Order EDR–248) (amending existing regulations to include foreign air carriers). See also testimony of Jerome F. Huisentruit, assistant general counsel for the Air Transport Association of America and respondent's witness on Board jurisdiction, App. 72–73.

The contemplation that common-law remedies will continue to exist is in conformance with longstanding Board policy dating back at least to the Board's approval in 1962 of an industry agreement covering trunk carriers and calling for ticketing time limits and reservation charges in combination with a provision for denied boarding compensation. See *Domestic Trunklines, Tariff Agreement*, 35 C. A. B. 881 (1962) (CAB Order E–18064). The Board specifically rejected the carriers' proposal that the denied boarding compensation be made an exclusive remedy:

"[T]o the extent that the proposed tariff provision is designed to restrict a passenger from seeking damages to which he would otherwise be entitled under the common law, we find it to be adverse to the public interest. Accordingly, we shall condition our approval of the agreement to make clear that the prescribed penalty is a minimum obligation of the carrier which, only if accepted by the passenger, would terminate the carrier's obligation." *Id.*, at 882–883.

tion whether petitioner had introduced sufficient evidence to sustain his claim. We remand the case for consideration of that question and for further proceedings consistent with this opinion.[19]

It is so ordered.

MR. JUSTICE WHITE, concurring.

I join the Court's opinion with these additional words.

It may be that under its rulemaking authority the Board would have power to order airline overbooking and to pre-empt recoveries under state law for undisclosed overbooking or for overselling. But it has not done so, at least as yet. It is also unnecessary to stay proceedings on the present state-law claim pending Board action under § 411. Neither an order denying nor one granting relief under that section would foreclose claims based on state law; and there is not present here the additional consideration that a § 411 proceeding would be helpful in resolving, or affecting in some manner, the state-law claim for compensatory and punitive damages. Cf. *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973); *Chicago Mercantile Exchange* v. *Deak-*

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[19] The Court of Appeals specifically remanded for reconsideration of the award of punitive damages on petitioner's claim of fraudulent misrepresentation. The propriety of that ruling was not challenged in this Court.

As the issues of ultimate liability and damages are not before us, we express no opinion as to their merits. We conclude above that mere compliance with agency regulations is not sufficient in itself under the Act to exempt a carrier from common-law liability. We make clear, however, that this conclusion is not intended to foreclose the courts on remand from considering, in relation to other issues in the case, evidence that the Board was fully advised of the practice complained of, and that the carrier had cooperated with the Board.

tor, 414 U. S. 113 (1973). I seriously doubt that any pending or future § 411 case would reveal anything relevant to this case about the Board's view of the propriety of overbooking and of overselling that is not already apparent from prior proceedings concerning those subjects.

OMAHA NATIONAL BANK *v.* NEBRASKANS FOR INDEPENDENT BANKING, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75–1382. Decided June 7, 1976

Court of Appeals' judgment that petitioner national bank's drive-in/walk-in facility was a branch petitioner was not permitted to operate because a state bank would not be permitted to operate a like facility is vacated, and the case is remanded for reconsideration in light of an intervening amendment to the statute redefining the "auxiliary teller" facilities that state banks may operate.

Certiorari granted; 530 F. 2d 755, vacated and remanded.

PER CURIAM.

From the time petitioner Omaha National Bank sought approval from the Regional Administrator of National Banks of its drive-in/walk-in facility until after the en banc decision of the Court of Appeals, Nebraska law permitted a state-chartered bank to operate one "attached auxiliary teller office" and not more than two "detached auxiliary teller offices." Neb. Rev. Stat. § 8–157 (2) (1974). The two types of "auxiliary teller offices" were defined in Nebraska Department of Banking Reg. § 8–157–01 (1970). The Court of Appeals found it "abundantly clear" that a state bank situated like Omaha National would not be permitted to operate the added facility, and ruled that under 12 U. S. C. § 36, see *First Nat. Bank* v. *Dickinson,* 396 U. S. 122, 135 (1969), the facility was a branch which the bank was not permitted to operate. 530 F. 2d 755, 762 (CA8 1976).

Since the en banc decision, § 8–157 (2) has been amended by Legislative Bill 763, approved by the Governor on March 11, 1976, to redefine "auxiliary teller" facilities which state banks may operate. It appearing

that this amendment, which will become effective in July 1976, may have a substantial bearing on the outcome of this case, the petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of Legislative Bill 763.

So ordered.

TENNESSEE ET AL. *v.* DUNLAP

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-95. Argued March 22, 1976—Decided June 10, 1976

The National Guard Technicians Act of 1968 provides that a National Guard technician, who is a full-time civilian employee of the Guard, must be a member of the Guard. 32 U. S. C. § 709 (b). Employment as a technician may be terminated upon separation from the Guard, § 709 (e) (1); for failure to meet military security requirements, § 709 (e) (2); or "for cause," § 709 (e) (3). *Held:* Where respondent's employment as a technician was terminated under § 709 (e) (1) when he was separated from the Guard upon expiration of his enlistment, § 709 (e) (3)'s requirement of "cause" has no application, and hence § 709 (e) (3) cannot provide the foundation for a claim that the termination of respondent's employment and the allegedly arbitrary refusal to re-enlist him violated due process. Pp. 315-316.

514 F. 2d 130, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Alex B. Shipley, Jr., Assistant Attorney General of Tennessee, argued the cause for petitioners. With him on the brief was *R. A. Ashley, Jr.*, Attorney General.

William Terry Denton argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent brought this action in the United States District Court for the Eastern District of Tennessee, challenging the termination of his employment as a tech-

Solicitor General Bork, Deputy Solicitor General Jones, and *John F. Cooney* filed a brief for the United States as *amicus curiae* urging reversal.

nician with the Tennessee Air National Guard as violative of the Due Process Clause of the Fourteenth Amendment. Petitioners are the defendants below—the State of Tennessee and its Governor, the Tennessee Air National Guard, and various officials of the Tennessee Air National Guard.

The National Guard Technicians Act of 1968 provides generally that a National Guard technician, who is a full-time civilian employee of the National Guard, must be a member of the National Guard,[1] and that a technician who is separated from the Guard "shall be promptly separated from his technician employment." 32 U. S. C. §§ 709 (b), (e)(1). The same section of the Act provides that "a technician may, at any time, be separated from his technician employment for cause." § 709 (e)(3). On December 8, 1972, respondent was discharged from the Tennessee Air National Guard for the stated reason that his term of enlistment had expired. Five days later respondent was notified by his commander that his employment as a technician would be terminated in 30 days because he was no longer a member of the Guard.

Respondent concedes the validity of the statutory requirement that a technician maintain his status as a member of the National Guard. Accordingly, the focus of his claims is petitioners' refusal to permit his re-enlistment. In his complaint respondent alleged that prior to De-

[1] The Secretary of the Army or the Air Force, in this case the Air Force, may by regulation exempt technicians from the requirement of membership in the Guard. 32 U. S. C. § 709 (b). The Senate and House committee reports contemplated the exemption of about 5% of the technicians—principally secretaries, clerk-typists, and security guards. H. R. Rep. No. 1823, 90th Cong., 2d Sess., 6 (1968); S. Rep. No. 1446, 90th Cong., 2d Sess., 5 (1968). Respondent has not been exempted from the requirement of Guard membership.

cember 8 he had attempted, without success, to re-enlist in the Guard. He further alleged that his request for a hearing before the board charged with making a recommendation on his re-enlistment was denied, that he was never supplied a copy of any charges against him, and that the only reason he ever received for the refusal of his requested re-enlistment was a general one that it was not in the best interest of the Guard to allow him to re-enlist. In fact, respondent alleged, the reason he was denied re-enlistment was to effect his discharge as a technician without the necessity of affording him the administrative recourse he would have had if he had been terminated as a technician directly and "for cause" under § 709 (e)(3). Liberally construed, the complaint then asserted three constitutional claims: (1) that the mechanism by which respondent was refused re-enlistment denied him procedural due process; (2) that the "alleged discretion" vested in his commander to decide whether his re-enlistment was in the best interest of the Guard does not comport with due process because of the lack of "any objective or ascertainable standards or criteria" to guide the exercise of that discretion; and (3) that the denial of re-enlistment was arbitrary and capricious, and therefore violative of due process.[2]

The District Court dismissed the complaint on the ground that the denial of re-enlistment was a military action not subject to review by a civilian court. The Court of Appeals for the Sixth Circuit reversed. It apparently agreed with the District Court that a decision to refuse re-enlistment in the Guard would ordinarily be nonreviewable in a civil court. But the Court of Appeals held that respondent should be given the oppor-

[2] The complaint also included a general assertion of discrimination in violation of the Equal Protection Clause. Never adequately alleged, and not considered by the District Court or the Court of Appeals, this assertion is not before us.

tunity to prove that his denial of re-enlistment was based not on any military considerations, but on a desire to terminate his technician employment in such a way as to circumvent § 709 (e)(3)'s requirement of "cause," which would have been applicable if his technician employment had been terminated directly. "In order for [§ 709 (e)(3)] to have meaning," the court concluded, "the unreviewable discretion of Guard officials to permit or refuse re-enlistments must not extend to decisions which are made for the purpose of affecting a guardsman's technician employment." 514 F. 2d 130, 133 (1975). In other words, the court held that if a denial of re-enlistment reflects no more than a desire to terminate employment as a technician, cause must be shown under § 709 (e)(3). And from this the court concluded that there was a genuine issue as to whether respondent had a property interest in continued employment sufficient to support his due process contentions. We granted certiorari. 423 U. S. 821 (1975).

We do not agree with the Court of Appeals that § 709 (e)(3) has any application to this case. Subsection (3) of § 709 (e) provides only one of several bases for the termination of a technician's employment. As already indicated, subsection (1) requires that a technician "who is separated from the National Guard or ceases to hold the military grade specified for his position . . . shall be promptly separated from his technician employment." Subsection (2) provides that a technician "who fails to meet . . . military security standards . . . may be separated from his employment as a technician and concurrently discharged from the National Guard." And subsection (3), to repeat, provides additionally that "a technician may, at any time, be separated from his technician employment for cause." There is nothing in the language or structure of § 709 (e), or in its legislative history, to suggest that subsection (3)'s requirement of

cause was intended to qualify subsection (1)'s mandate that termination of employment accompany separation from the Guard. Nor is there anything to suggest that subsection (3) was intended to have any bearing on whether one is separated from the Guard. Indeed, the relevant House and Senate committee reports summarize the three subsections as providing "for termination of civilian employment upon loss of Guard membership, failure to meet military security standards, *or* separation for cause." H. R. Rep. No. 1823, 90th Cong., 2d Sess., 3 (1968); S. Rep. No. 1446, 90th Cong., 2d Sess., 3 (1968) (emphasis added). See also H. R. Rep. No. 1823, p. 8; S. Rep. No. 1446, p. 7. The clear and *sole* import of subsection (3), then, is that if a technician remains a member of the National Guard and is otherwise eligible for continued employment under subsections (1) and (2), he may nevertheless be discharged for cause. There can be no significance, therefore, to the claim that the denial of re-enlistment to respondent was designed to circumvent the requirements of § 709 (e)(3). Nor can § 709 (e)(3) provide the foundation for any due process claim in this case, since the property interest it creates in continued employment is confined, in all events, to the guardsman's term of enlistment.[3]

The judgment of the Court of Appeals is

Reversed.

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[3] Respondent asserts in his brief that he had a property interest in the form of a legitimate expectation of re-enlistment and continued employment. See *Perry* v. *Sindermann*, 408 U. S. 593, 599–603 (1972). This assertion was not pleaded in respondent's complaint, was not considered by the District Court or the Court of Appeals, and accordingly is not before us.

UNITED STATES *v.* MACCOLLOM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1487. Argued March 29, 1976—Decided June 10, 1976

Nearly two years after his conviction of a federal crime, from which he took no appeal, respondent, *pro se*, filed a complaint for declaratory and injunctive relief, in which he asserted that he intended to seek vacation of his sentence pursuant to 28 U. S. C. § 2255; that he was unable to afford a transcript; that without one he could not frame his arguments for effective review; that a transcript would show that he had not been afforded effective assistance of counsel; and that there was insufficient evidence to support the guilty verdict. The District Court, after granting respondent leave to proceed *in forma pauperis*, appointing counsel, and holding a hearing, denied relief. The Court of Appeals reversed, holding that respondent was entitled to a transcript in order to assist him in preparing a motion under § 2255. The court concluded that 28 U. S. C. § 753 (f), which provides for a free transcript for indigent prisoners asserting a claim under § 2255 if the trial judge certifies that the asserted claim is "not frivolous" and that the transcript is "needed to decide the issue," does not prohibit courts from requiring the Government to supply an indigent prisoner with a free transcript *before* he files a § 2255 motion. By so ruling the court felt that it was unnecessary to hold § 753 (f) unconstitutional. *Held:* The judgment is reversed. Pp. 320-329; 329-330.

511 F. 2d 1116, reversed.

MR. JUSTICE REHNQUIST, joined by MR. CHIEF JUSTICE BURGER, MR. JUSTICE STEWART, and MR. JUSTICE POWELL, concluded:

1. Section 753 (f) does not violate Art. I, § 9, cl. 2, by constituting a suspension of the writ of habeas corpus. The right to a free transcript is not a necessary concomitant of the writ, which operated until 1944 with no provision at all for free transcripts for indigents. If Congress thus could have limited the writ directly without "suspending" it, Congress may do so indirectly. Pp. 322-323.

2. Nor does § 753 (f) violate the Due Process Clause of the Fifth Amendment and respondent's right to "equal protection," since respondent, to whom the transcript was available had he chosen to appeal his conviction, and remained available on the conditions set forth in § 753, had an adequate opportunity to attack his conviction. Pp. 323–328.

(a) The Due Process Clause does not establish a right of appeal, and § 753 (f)'s conditions are not "so arbitrary and unreasonable . . . as to require their invalidation," *Douglas* v. *California*, 372 U. S. 353, 365 (Harlan, J., dissenting). Pp. 323–324.

(b) Though those statutory conditions place an indigent in a position somewhat less advantageous than that of a person of means, the equal protection component of the Fifth Amendment's Due Process Clause does not guarantee absolute equality, the conditions of § 753 (f) providing an adequate access to procedures for review of the conviction of an indigent, who, like respondent, chose to forgo his opportunity for a direct appeal with its attendant free transcript. Pp. 324–328.

MR. JUSTICE BLACKMUN concluded that § 753 (f) afforded respondent a fair and adequate opportunity to present his claims effectively in this collateral proceeding, and that it is not necessary to consider the constitutional significance of what respondent might have done at the time he could have directly appealed his conviction. Pp. 329–330.

REHNQUIST, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 329. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 330. STEVENS, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 334.

Frank H. Easterbrook argued the cause for the United States *pro hac vice*. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Thornburgh,* and *Jerome M. Feit.*

John A. Strait, by appointment of the Court, 423 U. S. 1045, argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST announced the judgment of the Court in an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join.

This case presents the question of whether the restrictions imposed by 28 U. S. C. § 753 on the availability to an indigent prisoner of a free trial transcript to aid him in preparing a petition for collateral relief are consistent with the Fifth Amendment to the Constitution. The Court of Appeals for the Ninth Circuit, in contrast to every other Court of Appeals which has ruled on the issue, held that such prisoners have an absolute right to a transcript. We reverse.

I

Respondent was convicted of uttering forged currency in violation of 18 U. S. C. § 472 after a jury trial in the United States District Court for the Western District of Washington. On June 3, 1970, he was sentenced to 10 years' imprisonment. He did not appeal. Nearly two years later respondent, acting *pro se*, filed in the District Court a paper designated "Motion for Transcript in Forma Pauperis." This was returned to respondent with the advice that he first had to file a motion pursuant to 28 U. S. C. § 2255 before the court could act on his request for a transcript.

Respondent then filed a "complaint for Declaratory Judgment and Injunctive Relief" in which he alleged that he "intends to move this Court for vacation of his sentence pursuant to 28 U. S. C. § 2255." He asserted that he was unable to afford a transcript, that a transcript would show that he had not been afforded effective assistance of counsel, and that there was insufficient evidence to support the verdict of guilty. The complaint further alleged that without a transcript respondent would be "unable to frame his arguments for fair and

effective review." The complaint did not elaborate upon respondent's two asserted grounds for relief.

The District Court treated this pleading as a motion under 28 U. S. C. § 2255, granted respondent leave to proceed *in forma pauperis*, appointed counsel, and held a hearing. After the hearing the court dismissed the complaint for failure to state a claim upon which relief could be granted. Respondent appealed, and a divided panel of the Court of Appeals reversed, 511 F. 2d 1116 (1974), holding that respondent was entitled to a transcript "in order to assist him in the preparation of a post-conviction motion under 28 U. S. C. [§] 2255." *Id.*, at 1124.

II

Congress has expressly addressed the question of furnishing transcripts at public expense in 28 U. S. C. § 753 (f), which provides in pertinent part:

> "Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U. S. C. [§] 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. . . ."

The statute thus provides for a free transcript for indigent prisoners asserting a claim under § 2255 if a judge certifies that the asserted claim is "not frivolous"

and that the transcript is "needed to decide the issue." The District Court, by its conclusion that respondent failed to state a claim upon which relief could be granted, implicitly decided one of these two issues against respondent.

The Court of Appeals held that it was not necessary to declare § 753 (f) unconstitutional in order to grant respondent relief. Rather, the court held that the section "does not prohibit courts from . . . requiring the government to supply an imprisoned indigent with a free transcript *before* he files a § 2255 motion. Such a court order would simply fill a constitutional deficit not addressed by the statute." (Emphasis added.) 511 F. 2d, at 1119–1120.

This is a novel approach to statutory construction. The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress. *Reeside* v. *Walker*, 11 How. 272, 291 (1851). This particular statute contains a limited grant of authority to the courts to authorize the expenditure of public funds for furnishing transcripts to plaintiffs in § 2255 actions. The fact that the statute does not "prohibit" the furnishing of free transcripts in other circumstances is of little significance, since most such statutes speak only in terms of granting authority for the expenditure of federal funds. Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized. *Botany Mills* v. *United States*, 278 U. S. 282, 289 (1929); *Passenger Corp.* v. *Passengers Assn.*, 414 U. S. 453, 458 (1974).[1]

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[1] Our Brother STEVENS would construe the pertinent part of § 753 (f) to "make transcripts available almost automatically in

It is true, as respondent observes, that the statute, as currently written, distinguishes between habeas corpus petitioners and parties proceeding under § 2255 in that only the latter must make a showing of need and nonfrivolousness in order to obtain a free transcript. Thus while it is still true that the "remedy" afforded by § 2255 is "exactly commensurate with that which had previously been available by habeas corpus . . . ," *Hill* v. *United States*, 368 U. S. 424, 427 (1962), the right to pursue that remedy with a free transcript has now been somewhat limited by Congress.[2] Respondent argues that this constitutes a suspension of the writ of habeas corpus in violation of Art. I, § 9, cl. 2, of the Constitution.

This argument presupposes, *inter alia*, that a right to a free transcript is a necessary concomitant of the writ which the Founders declared could not be suspended. This is obviously not the case. The writ of habeas corpus operated until 1944 with no provision for free tran-

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§ 2255 proceedings . . . ," *post*, at 338. We think such a construction would do violence to the intent of Congress which clearly appears from the language of that section, *supra*, at 320. Congress *did* in that section make transcripts available automatically on *direct appeal*, but in the same section limited their availability in § 2255 motions to cases where the trial judge certifies that the § 2255 suit is not frivolous and that the transcript is needed to decide the issue presented by the suit. Our Brother STEVENS advances what may well be very sound policy reasons for furnishing free transcripts as a matter of course to § 2255 plaintiffs, as well as to convicted defendants pursuing direct appeals. But it is plain from a reading of § 753 (f) that these considerations have not yet commended themselves to Congress.

[2] The difference is not as great as it might appear to be, however, because habeas corpus petitioners who wish to proceed *in forma pauperis* must still overcome a "nonfrivolous" barrier under 28 U. S. C. § 1915. *E. g.*, *Kitchens* v. *Alderman*, 376 F. 2d 262 (CA5 1967); *Blair* v. *California*, 340 F. 2d 741 (CA9 1965).

scripts for indigents. See 58 Stat. 6, 28 U. S. C. § 9a (1940 ed., Supp. IV). Congress, when in that year it authorized free transcripts for the first time, could certainly have limited the authorization to nonfrivolous cases where a need had been shown. If Congress could have thus limited the writ directly without "suspending" it, it follows that it may do so indirectly. The only possible objection is a Fifth Amendment due process-equal protection claim, to which we now turn.

III

The Court of Appeals did not technically decide this constitutional issue, since it thought it had discovered a lacuna in the statute, but its reference to a "constitutional deficit" suggests its view on this question. Respondent urges that if the statute is read as we now read it, it violates both the Due Process Clause of the Fifth Amendment and his right to "equal protection."

The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, see *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction.[3] In this case respondent was granted a statutory right of appeal without payment of costs if he were an indigent, and had he pursued that right § 753 (f) would have authorized the use of public funds to furnish him a transcript of the trial proceedings without any further showing on his part. Having forgone this right, which existed by force of statute only, he may not several years later successfully assert a due process right to review of his conviction and thereby obtain a free transcript on his own terms as an ancillary consti-

[3] The constitutional treatment of habeas corpus, of course, is not contained in the Due Process Clause, but in Art. I, § 9, cl. 2, of the Constitution.

tutional benefit. The conditions which Congress had imposed on obtaining such a transcript in § 753 (f) are not "so arbitrary and unreasonable . . . as to require their invalidation," *Douglas* v. *California*, 372 U. S. 353, 365 (1963) (Harlan, J., dissenting); rather they "comport with fair procedure," *id.*, at 357 (Court's opinion).

Although the statutory conditions established in § 753 (f) with respect to furnishing a free transcript to movants in § 2255 proceedings are therefore consistent with the due process requirements of the Fifth Amendment, it is undoubtedly true that they place an indigent in a somewhat less advantageous position than a person of means. But neither the Equal Protection Clause of the Fourteenth Amendment, nor the counterpart equal protection requirement embodied in the Fifth Amendment, guarantees "absolute equality or precisely equal advantages," *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 24 (1973). In the context of a criminal proceeding they require only "an adequate opportunity to present [one's] claims fairly . . . ." *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974).

In *Douglas* v. *California, supra,* the Court held that the State must provide counsel for an indigent on his first appeal as of right. But in *Ross* v. *Moffitt, supra,* we declined to extend that holding to a discretionary second appeal from an intermediate appellate court to the Supreme Court of North Carolina. We think the distinction between these two holdings of the Court is of considerable assistance in resolving respondent's equal protection claim. Respondent in this case had an opportunity for direct appeal, and had he chosen to pursue it he would have been furnished a free transcript of the trial proceedings. But having forgone that right, and instead some years later having sought to obtain a free transcript in order to make the best case he could in a

proceeding under § 2255, respondent stands in a different position.

The Court has held that when a State grants a right to collateral review, it may not deny the right to an indigent simply because of inability to pay the required filing fee, *Smith* v. *Bennett*, 365 U. S. 708 (1961). There is no such impediment here; respondent was permitted to proceed *in forma pauperis* in his § 2255 action. The Court has also held that a State may not confide to the public defender the final decision as to whether a transcript shall be available to the criminal defendant who collaterally attacks his conviction, *Lane* v. *Brown*, 372 U. S. 477 (1963). There the Court observed that the state provision "confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all." *Id.*, at 485.

The congressional statute governing the furnishing of free transcripts to plaintiffs in § 2255 actions has no such infirmity. The decision as to the provisions of the transcript at public expense is made initially by an official at the very heart of the judicial system—a district judge in the judicial district in which the § 2255 plaintiff was tried. The district court has the power to order a free transcript furnished if it finds that the "suit . . . is not frivolous and that the transcript is needed to decide the issue presented . . . ." 28 U. S. C. § 753 (f).

We think that the formula devised by Congress satisfies the equal protection component of the Fifth Amendment. Respondent chose to forgo his opportunity for direct appeal with its attendant unconditional free transcript. This choice affects his later equal protection claim as well as his due process claim. Equal protection does not require the Government to furnish to the indigent a delayed duplicate of a right of appeal with attendant free transcript which it offered in the first

instance, even though a criminal defendant of means might well decide to purchase such a transcript in pursuit of relief under § 2255. The basic question is one of adequacy of respondent's access to procedures for review of his conviction, *Ross* v. *Moffitt, supra,* and it must be decided in the light of avenues which respondent chose not to follow as well as those he now seeks to widen. We think it enough at the collateral-relief stage that Congress has provided that the transcript be paid for by public funds if one demonstrates to a district judge that his § 2255 claim is not frivolous, and that the transcript is needed to decide the issue presented.

Respondent urged in oral argument that if trial counsel had done a poor job of representing a criminal defendant, such counsel might well urge the defendant to forgo his right of appeal in order to prevent a claim of ineffective assistance of counsel from being raised on the appeal. It is certainly conceivable that such a state of facts might exist, notwithstanding the fidelity to the interest of their clients demonstrated repeatedly by the overwhelming majority of the members of the legal profession. But § 753 (f) does not require that a § 2255 plaintiff must *prove* his claim in order to obtain a transcript, but only that he convince the district court that such claim is not frivolous. Had the District Court here been confronted not with merely a conclusory allegation, but with some factual allegations indicating a denial of respondent's Sixth Amendment right to counsel, together with an additional explicit assertion that trial counsel had urged respondent to forgo his appeal, that court might have concluded that such a claim was not frivolous, and further decided that a free transcript should be furnished pursuant to § 753 (f).[4]

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[4] Since a § 2255 claim is usually presented to the trial judge he will likely have an independent recollection of counsel's performance

But that is not our case. Respondent made only a naked allegation of ineffective assistance of counsel. Since any discussion he may have had with his trial counsel as to the desirability of appeal would not normally appear in the transcript of proceedings at trial, the furnishing of such transcript would not have aided him in refreshing his recollection of such discussions. The failure to flesh out this aspect of respondent's claim of ineffective assistance of counsel, then, is not likely to have been cured by a transcript.

We think this is an area of the law where the opinions of the courts of appeals are entitled to particular weight, since they represent not only expositions of federal and constitutional law, but also expressions of essentially practical judgment on questions which those courts must confront far more than we do. The fact that with the exception of the decision presently under review they have unanimously concluded that the conditions established by § 753 (f) for the furnishing of a free transcript do not violate the Fifth Amendment is significant.[5] A practical reason for their conclusion is well expressed by Judge Haynsworth in *United States* v. *Shoaf*, 341 F. 2d 832 (CA4 1964), in which he said for that court:

> "The usual grounds for successful collateral attacks upon convictions arise out of occurrences out-

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which may well lead him to conclude that a movant's claim is nonfrivolous.

[5] *E. g., Ellis* v. *Maine*, 448 F. 2d 1325 (CA1 1971); *United States ex rel. Buford* v. *Henderson*, 524 F. 2d 147 (CA2 1975); *United States* v. *Shoaf*, 341 F. 2d 832 (CA4 1964); *United States* v. *Herrera*, 474 F. 2d 1049 (CA5 1973); *Hoover* v. *United States*, 416 F. 2d 431 (CA6 1969); *United States ex rel. Nunes* v. *Nelson*, 467 F. 2d 1380 (CA9 1972) (habeas corpus); *Taylor* v. *United States*, 238 F. 2d 409 (CA9 1956) (§ 2255 motion); *Hines* v. *Baker*, 422 F. 2d 1002 (CA10 1970).

> side of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the need of having his memory refreshed by reading a transcript. He may well have a need of a transcript [to support his claim] but rarely, if ever, . . . to become aware of the events or occurrences which constitute a ground for collateral attack," *Id.*, at 835.[6]

We conclude that the fact that a transcript was available had respondent chosen to appeal from his conviction, and remained available on the conditions set forth in § 753 to an indigent proceeding under § 2255, afforded respondent an adequate opportunity to attack his conviction. To hold otherwise would be to place the indigent defendant in a more favorable position than a similarly situated prisoner of some, but not unlimited, means, who presumably would make an evaluation much like that prescribed in § 753 (f) before he spent his own funds for a transcript.

> "[T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Ross* v. *Moffitt*, 417 U. S., at 616.

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[6] This opinion and other aspects of this question were thoroughly discussed shortly after the 1965 amendment to § 753 (f) in Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343 (1967).

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I am in complete accord with what is said in n. 1 of the plurality opinion, *ante*, at 321–322, regarding MR. JUSTICE STEVENS' dissent. It is not this Court's function to rewrite 28 U. S. C. § 753 (f) in order to reflect—as that dissent appears to me to urge—what may be regarded as sound policy for the administration of our criminal justice system.

I write separately, however, to emphasize the narrowness of the constitutional issue that is before us and the ease of its resolution. The answer to this case lies, I think, in the fact that respondent MacCollom has a *current* opportunity to present his claims fairly, and we need not consider the constitutional significance of what he might have done at the time a direct appeal from his conviction could have been taken.

For me, the issue in this case is whether the Constitution requires that a transcript be provided when an indigent makes no showing, with any degree of particularity, that he requires the transcript in order to make an effective collateral attack on his conviction. The crucial inquiry, as the Court said in the analogous Fourteenth Amendment context, is whether § 753 (f) affords indigents "an adequate opportunity to present their claims fairly within the adversary system." *Ross* v. *Moffitt*, 417 U. S. 600, 612 (1974).

Here, respondent was permitted to proceed *in forma pauperis*, and counsel was appointed for him. In order for him to obtain a transcript of his trial, he was required to show only that his claim was not frivolous and that there was a basis, grounded on *some* articulable facts,

for believing that a transcript would assist him in his § 2255 proceeding. Clearly, there is no constitutional requirement that the United States provide an indigent with a transcript when that transcript is not necessary in order for him to prove his claim, or when his claim is frivolous on its face. Nor does the Constitution require that an indigent be furnished every possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind.

The way was thus open for respondent to present his claim fairly within the very bounds of § 753 (f). One need go no further. I therefore join the judgment reversing the Court of Appeals.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I join my Brother STEVENS' dissent but add this separate dissent to record my disagreement with the plurality's view that the Government's refusal to furnish an indigent defendant a free trial transcript in a proceeding under 28 U. S. C. § 2255, upon merely a showing of indigency, does not deny respondent equal protection of the laws secured against the Federal Government, as the plurality concedes, through the Due Process Clause of the Fifth Amendment. See *Buckley* v. *Valeo*, 424 U. S. 1, 87 (1976); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975).

"[T]he central aim of our entire judicial system [is that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court,'" *Griffin* v. *Illinois*, 351 U. S. 12, 17 (1956) (plurality opinion), for this is a "country dedicated to affording equal justice to all and

special privileges to none in the administration of its criminal law." *Id.*, at 19. "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts* v. *LaVallee*, 389 U. S. 40, 42 (1967). Thus, in *Griffin*, the Court held that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," 351 U. S., at 19, and that therefore the State must furnish the indigent defendant with a free trial transcript for purposes of direct appeal.

The *Griffin* principle of equality was not limited to transcripts for purposes of direct appellate review. In *Smith* v. *Bennett*, 365 U. S. 708 (1961), the Court invalidated a filing fee for state habeas corpus as applied to indigents. The invalidation was held to be required by an earlier decision holding that a State could not require an indigent to pay a filing fee before being allowed to appeal in one of its courts. *Burns* v. *Ohio*, 360 U. S. 252 (1959). Later, *Lane* v. *Brown*, 372 U. S. 477, 484 (1963), held that "*Smith* makes clear that the *Griffin* principle also applies to state collateral proceedings . . . ."

The *Griffin* equality principle was next applied to appeals from state habeas proceedings. In *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966), the Court, stating that "having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration," held that an indigent defendant must be furnished a free transcript of his state habeas proceedings for purposes of appeal from a denial of that relief. *Id.*, at 194. And in *Gardner* v. *California*, 393 U. S. 367 (1969), the Court went still further and required the furnishing of a transcript of a habeas proceeding for the purposes of a second such

proceeding. Thus, the plurality's opinion today that respondent may be required to show more than indigency before being entitled to his trial transcript for purposes of collateral review is a plain departure from *Griffin* and its progeny.

The denial in this case is particularly egregious, for one of respondent's claims on the merits is that he was denied effective assistance of counsel. Substantiation of such a claim is virtually impossible without the aid of a trial transcript. Yet the plurality denigrates respondent's claim as a "naked allegation." *Ante*, at 327. Essentially, therefore, he is denied a transcript for making an unsubstantiated allegation, an allegation that obviously he cannot establish without a transcript.[1]

It bears emphasis that where, as here, denial of equal protection is the issue, it matters not, under our cases, that the indigent had a fair opportunity to present a defense and have his conviction reviewed on direct appeal. The unfairness born of discrimination denying equal protection is as offensive to the Constitution as any unfairness resulting from procedural deficiencies in the criminal system. Thus, I cannot accept the plurality's argument that respondent could constitutionally be de-

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[1] Respondent's other allegation is insufficiency of the evidence. Two of our decisions plainly indicate that this allegation suffices to require provision of a verbatim transcript. See *Mayer* v. *City of Chicago*, 404 U. S. 189 (1971); *Draper* v. *Washington*, 372 U. S. 487 (1963). *Mayer* also indicated that an allegation of prejudicial prosecutorial misconduct, 404 U. S., at 198, also requires provision of a transcript. That claim, for purposes of substantiation on appeal or collateral review, is like respondent's first claim of ineffective assistance of counsel. *Mayer*, 404 U. S., at 195, held that where the grounds of appeal are insufficiency of the evidence and prosecutorial misconduct, the defendant need only "make out a colorable need for a complete transcript" in order to be entitled to it.

nied a free transcript because "[r]espondent in this case had an opportunity for direct appeal, and had he chosen to pursue it he would have been furnished a free transcript of the trial proceedings." *Ante*, at 324. The Constitution demands that respondent, despite his indigency, be afforded the same opportunity for collateral review of his conviction as the nonindigent.[2] "If [the Government] has a general policy of allowing [collateral relief], it cannot make lack of means an effective bar to the exercise of this opportunity. The [Government] cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." *Griffin* v. *Illinois*, 351 U. S., at 24 (Frankfurter, J., concurring in judgment).

The plurality's reliance, *ante*, at 324, upon *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974), for the proposition that "[i]n the context of a criminal proceeding [equal protection] require[s] only 'an adequate opportunity to present [one's] claims fairly' " is patently misplaced. This quotation from *Ross*, read in context, speaks not merely to equality of opportunity in the overall criminal process, but also to equality of opportunity at any stage of the process where the validity of the defendant's restraint or conviction is the primary consideration.

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[2] Indeed, in *Burns* v. *Ohio*, 360 U. S. 252 (1959), a filing fee for direct appeals was held invalid as applied to indigents, even though the indigent petitioner there had already received one appellate review of his conviction. As the Court stated:

"[T]he State argues that petitioner received one appellate review of his conviction in Ohio, while in *Griffin*, Illinois had left the defendant without any judicial review of his conviction. This is a distinction without a difference for, as *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.*, at 257.

I reject as wholly fallacious the argument that adequacy of opportunity to present claims at trial and on direct appeal so far diminishes the importance of collateral review, that discrimination between indigent and nonindigent in post-conviction proceedings is constitutionally tolerable. That argument is implicitly if not explicitly rejected in the unbroken line of our decisions that make no distinction, for purposes of equal protection analysis, between collateral proceedings and trials and direct appeals. Any distinction must necessarily be constitutionally intolerable where the stakes are no less than the constitutionality of a criminal conviction. Any distinction would also be plainly inconsistent with the explicit recognition given habeas corpus in Art. I, § 9, cl. 2, of the Constitution. See *Fay* v. *Noia*, 372 U. S. 391, 399–403 (1963). And for federal prisoners, "history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis* v. *United States*, 417 U. S. 333, 343 (1974).

Today's decision empties of all promise the Court's assurance only six years ago that decisions applying *Griffin* "have pointedly demonstrated that the passage of time has heightened rather than weakened the attempts [by this Court] to mitigate the disparate treatment of indigents in the criminal process." *Williams* v. *Illinois*, 399 U. S. 235, 241 (1970). I dissent.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The decisive question in this case is whether, in judging the sufficiency of respondent's motion, we should assume that his allegations are true.

He has alleged that there was insufficient evidence to

support his conviction, but that he did not appeal. If he had appealed, respondent would have obtained the transcript of the trial at Government expense.[1] He has also alleged that his lawyer did not provide him with the effective representation at trial that the Sixth Amendment requires, and that this conclusion would be supported by an examination of the trial transcript. Respondent has neither the training nor the memory to allege the factual basis for that conclusion. If, however, that conclusion is accurate, he is entitled not only to a transcript but to a new trial.

As the plurality points out, there are legitimate reasons for holding that respondent's allegations are not specific enough. In most cases the pleader should be able to set forth more factual details to support his ultimate conclusion. If respondent's pleading is adequate, almost any general statement claiming ineffective assistance of counsel would entitle a prisoner to a transcript in a proceeding under § 2255. In short, the right to a transcript at that stage would be almost as automatic as when a direct appeal is taken. Thus, in a sense, this case presents the question whether the defendant's right to a transcript at Government expense should survive if he fails to take a direct appeal.

There are two reasons why I would answer that question in the affirmative and accept respondent's allegations at face value for purposes of determining whether his motion is frivolous and whether a transcript is necessary to decide the claims he asserts.

First, § 753 (f) should be interpreted to establish a standard of nonfrivolousness and need that may be fairly administered. The statute itself does not address the standard that judges are to use in determining "that the suit or appeal is not frivolous and that the transcript is

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[1] 28 U. S. C. § 753 (f); 18 U. S. C. §§ 3006A (a), (c), (d)(6).

needed to decide the issue presented by the suit or appeal," and the legislative history is also silent on the question.[2] The plurality reads the statute to impose upon the § 2255 movant the burden of putting forward "some factual allegations" indicating a denial of constitutional rights, *ante*, at 326, but this reading creates the risk that district judges will exercise the discretion conferred by the statute on a haphazard rather than a principled basis. In many cases, the judge can have no rational basis for determining whether or not the movant could ultimately succeed on the merits without first

[2] The provision for free transcripts in § 2255 cases was added in 1965 by Pub. L. 89–167, 79 Stat. 647, which followed verbatim a proposal of the Judicial Conference in 1961. Report of the Judicial Conference of the United States, Proceedings 100–101 (1961). The primary purpose of the amendment was to make transcripts as available to indigent federal prisoners on § 2255 motions as on habeas corpus. See H. R. Rep. No. 133, 89th Cong., 1st Sess. (1965); S. Rep. No. 617, 89th Cong., 1st Sess. (1965); 111 Cong. Rec. 5000 (1965) (remarks of Rep. Celler); *id.*, at 20828–20829. The legislative sources do not discuss what standards should be applied in determining nonfrivolousness and need.

Specifically, the legislative history does not address the question whether federal prisoners are required to make a stronger showing of nonfrivolousness and need on § 2255 motions than on habeas corpus. Although § 753 (f) expressly requires certification of nonfrivolousness and need only in § 2255 cases, it requires prior leave to proceed *in forma pauperis* in both habeas corpus and § 2255 proceedings. This requirement, in turn, imports the requirement of nonfrivolousness contained in 28 U. S. C. § 1915 (d). The legislative history contains no indication that the standard of nonfrivolousness for § 2255 cases was to be any stronger than that imposed by § 1915 (d). See Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343, 356–357 (1967). Indeed, § 1915 is nowhere mentioned. Nor does the requirement of need impose any additional burden upon § 2255 movants, since §§ 753 (f) and 1915 (d) could not reasonably be interpreted to grant a right to a transcript to habeas corpus petitioners who assert nonfrivolous claims that can be resolved without a transcript.

ordering a transcript.[3] Unquestionably some judges routinely order a transcript in a case like this while others do not. Given the uncertainty of the standard adopted by the plurality,[4] the indigent's right to protection against the risk that his appointed counsel was in fact ineffective depends on the happenstance of what district judge has been assigned to his case. Such an important protection should not depend on such a fortuitous circumstance. In short, the administration of justice in the federal courts would be more evenhanded if the indigent's right to a transcript were not dependent either upon the advice he receives from counsel at the time when he may still file a direct appeal,[5] or upon his

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[3] Since our most gifted trial lawyers usually need daily copy to be sure of exactly what happened in the courtroom the preceding day, and since the passage of time is bound to cause any trial to be blended with many others in the judge's memory, it is almost inconceivable that the judge can determine whether a motion has arguable merit without the benefit of a transcript.

[4] Would the plurality regard respondent's pleadings as sufficient if he had alleged that his lawyer failed to object to inadmissible evidence, failed to argue effectively to the jury, failed to advise him properly about his appeal rights, or failed to conduct an adequate cross-examination of key prosecution witnesses? Such allegations are just as easily made as the general claim of ineffectiveness of counsel and just as difficult to support by factual details without the assistance of a transcript. Rather than requiring the district judge to take the time to evaluate all the permutations of such allegations as these, is it not more sensible to make the record available promptly and automatically?

[5] Indeed, the failure of respondent's attorney to file a notice of appeal itself supports his claim of denial of effective assistance of counsel. Because notice of appeal from a criminal conviction must be filed within the 10-day period specified in Fed. Rule App. Proc. 4 (b), most defense counsel routinely file such notice in order to protect their clients' right to appeal and to obtain a transcript. Furthermore, in the present case, respondent represented in this Court, although not in the District Court, that he did not appeal from his conviction because he was advised by his lawyer that " 'it would

later ability to persuade a trial judge that if the transcript were available, it would show that counsel's advice was actually unsound. The indigent is at least entitled to a transcript of sufficient completeness to permit a determination of frivolousness. Cf. *Coppedge* v. *United States*, 369 U. S. 438, 445–446.[6]

Second, in my judgment a ruling in respondent's favor would tend to improve the administration of justice in the federal system. If, as seems probable, such a ruling would make transcripts available almost automatically in § 2255 proceedings, it would make good sense for federal prosecutors to adopt the practice of routinely ordering the transcript at the conclusion of every criminal trial resulting in conviction. Such a practice would eliminate a serious cause of delay in the processing of criminal appeals.[7] Even assuming

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interfere with a motion to modify sentence.'" Brief for Respondent 3.

[6] Although I have described that right as "almost" the equivalent of the absolute right to a full transcript on direct appeal, the difference between the two is significant. Before Congress amended § 753 (f) to provide for automatic availability of transcripts, Pub. L. 91–545, 84 Stat. 1412, the statute already authorized transcripts for appellants proceeding *in forma pauperis*, 28 U. S. C. § 753 (f) (1964 ed., Supp. V), but, under *Coppedge*, 369 U. S., at 446, it only entitled the appellant to a transcript sufficient to determine nonfrivolousness. The fact that Congress amended the statute to give the appellant the right to a complete transcript demonstrates (a) that Congress was aware of this difference, and (b) that recognition of a right in a § 2255 context which is only "almost" as valuable as the right on direct appeal is consistent with the intent of Congress.

[7] As Judge Craven noted in *Jones* v. *Superintendent, Virginia State Farm*, 460 F. 2d 150, 153 n. 4 (CA4 1972), rehearing denied, 465 F. 2d 1091, cert. denied, 410 U. S. 944 (1973): "It has been noted time and again that the delay in deciding appeals is often attributable to delay in getting a transcript." Since the allowance of bail pending appeal is almost routine in the federal system (a routine, incidentally, which might well be restudied), defendants may postpone their incarceration by delaying their appeals as long

an increase in monetary costs,[8] we should take into account the costs associated with unnecessary delay in the appellate process and the saving in judges' time that would result from the elimination of the need to decide questions such as this. One of our Nation's scarcest resources is the time of our judges; if spending a few dollars[9] for automatic disposition of preliminary issues will enable them to devote extra time to adjudicating disputes on the merits, the money will be well spent. See *Coppedge, supra,* at 450–452; *id.,* at 458 (STEWART, J., concurring); J. Frank, American Law: The Case for

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as possible, and, thus, they have a practical motivation for not ordering transcripts any sooner than necessary.

[8] Appeals are now filed in approximately 75% of criminal cases in which a defendant is convicted after trial. The rate has increased steadily from approximately 46% in Fiscal Year 1966 to approximately 75% in Fiscal Year 1973, where it has remained. See Annual Reports of the Director of the Administrative Office of the United States Courts, Tables B1, D4 (1966–1969, 1971–1975) (compare total criminal appeals commenced with total convictions after trial). Since appeals are taken from such a high percentage of convictions after trial, since experience teaches us that the appeal rate is more apt to increase than decrease, and since an appreciable number of transcripts are no doubt prepared in § 2255 proceedings already, a rule requiring the automatic preparation of a transcript would have a minimal impact on the budget. Even if the total number of transcripts would increase significantly, it is doubtful that there would be a parallel increase in cost because there would surely be a substantial saving in substituting a routine practice for the present practice of ordering transcripts individually, often at a time when the court reporter is faced with an appellate deadline.

[9] I use the words "few dollars" advisedly because the entire cost of subsidizing the defense of indigents, including the fees and expenses of appointed counsel, has amounted to between 5% and 9% of the expenditures for the lower federal courts in recent years, which in turn have been less than 1/10 of 1% of the national budget. Annual Reports of the Director of the Administrative Office of the United States Courts VI–3 (1975), IV–2 (1974), III–3 (1973), III–3 (1972); Budget of the United States Government: Fiscal Year 1977, p. 153 (1976).

Radical Reform 85–110 (1969). More importantly, routine availability of transcripts would minimize the danger—which is not so insignificant that it can be safely ignored—that the rights of an indigent defendant may be lost because of the ineptitude of his appointed counsel.

I recognize that my view does not reflect a necessary reading of the statute as applied to respondent's § 2255 motion, but it certainly is permissible to rule as a matter of law that his allegations are sufficient to plead a nonfrivolous claim that cannot be resolved without a transcript.[10] Such a ruling would have the added virtue of avoiding the constitutional issue discussed in Part III of the plurality's opinion. Cf. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401. On balance, I would therefore affirm the judgment of the Court of Appeals for the Ninth Circuit.

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[10] Cf. *Hospital Bldg. Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 746–747; *Haines* v. *Kerner*, 404 U. S. 519, 520–521; *Conley* v. *Gibson*, 355 U. S. 41, 45–46.

BISHOP *v.* WOOD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74–1303. Argued March 1, 1976—Decided June 10, 1976

On respondent Chief of Police's recommendation, respondent City Manager terminated petitioner's employment as a policeman without a hearing, telling him privately that the dismissal was based on a failure to follow orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer. A city ordinance provides that a permanent city employee (as petitioner was classified) may be discharged if he fails to perform work up to the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties. Petitioner brought suit against respondents, claiming that as a "permanent employee" he had a constitutional right to a pretermination hearing; that the ordinance, even though not expressly so providing, should be read to prohibit discharge for any reason other than those specified and therefore to confer tenure on all permanent employees, that his period of service, together with his "permanent" classification, gave him a sufficient expectation of continued employment to constitute a protected property interest under the Due Process Clause of the Fourteenth Amendment; and that the false explanation for his discharge deprived him of interest in liberty protected by that Clause. During pretrial discovery petitioner was again advised of the reasons for his dismissal. The District Court granted respondents' motion for a summary judgment, holding, on the basis of its understanding of state law, that petitioner "held his position at the will and pleasure of the city." The Court of Appeals affirmed. *Held:*

1. Under the District Court's tenable view of state law, which was upheld by the Court of Appeals and which will be accepted by this Court in the absence of any authoritative state-court interpretation of the ordinance involved, petitioner's discharge did not deprive him of a property interest protected by the Due Process Clause of the Fourteenth Amendment. Pp. 343–347.

2. Assuming that the explanation for petitioner's discharge was false, as this Court must do since summary judgment was entered against him, such false explanation did not deprive him of an interest in liberty protected by that Clause. Pp. 347–349.

(a) Since the City Manager's private oral communication to petitioner of the reasons for his discharge was never made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honor, or integrity" was thereby impaired. Nor can the communication of such reasons during pretrial discovery provide retroactive support for such claim, since it was made in the course of a judicial proceeding that did not commence until after petitioner had suffered his alleged injury. Pp. 348–349.

(b) The truth or falsity of the City Manager's explanation determines whether or not his decision to discharge petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty was impaired. P. 349.

Affirmed. See 498 F. 2d 1341.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 350. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 355. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 361.

Norman B. Smith argued the cause and filed briefs for petitioner.

Charles E. Burgin argued the cause and filed a brief for respondents.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

Acting on the recommendation of the Chief of Police, the City Manager of Marion, N. C., terminated petitioner's employment as a policeman without affording him a hearing to determine the sufficiency of the cause for his discharge. Petitioner brought suit contending

**Stephen J. Pollak* and *Richard M. Sharp* filed a brief for the Coalition of American Public Employees as *amicus curiae* urging reversal.

that since a city ordinance classified him as a "permanent employee," he had a constitutional right to a pretermination hearing.[1] During pretrial discovery petitioner was advised that his dismissal was based on a failure to follow certain orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer. Petitioner and several other police officers filed affidavits essentially denying the truth of these charges. The District Court granted defendants' motion for summary judgment.[2] The Court of Appeals affirmed,[3] and we granted certiorari, 423 U. S. 890.

The questions for us to decide are (1) whether petitioner's employment status was a property interest protected by the Due Process Clause of the Fourteenth Amendment,[4] and (2) assuming that the explanation for his discharge was false, whether that false explanation deprived him of an interest in liberty protected by that Clause.

I

Petitioner was employed by the city of Marion as a probationary policeman on June 9, 1969. After six months he became a permanent employee. He was dismissed on March 31, 1972. He claims that he had either an express or an implied right to continued employment.

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[1] He relied on 42 U. S. C. § 1983, invoking federal jurisdiction under 28 U. S. C. § 1343 (3). He sought reinstatement and backpay. The defendants were the then City Manager, Chief of Police, and the city of Marion. Since the city is not a "person" within the meaning of the statute, it was not a proper defendant. *Monroe* v. *Pape*, 365 U. S. 167, 187–192.

[2] 377 F. Supp. 501 (WDNC 1973).

[3] A three-judge panel of the Court of Appeals affirmed, with one judge dissenting, 498 F. 2d 1341 (CA4 1974); then, after granting a rehearing en banc, the court affirmed without opinion by an equally divided court.

[4] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14.

A city ordinance provides that a permanent employee may be discharged if he fails to perform work up to the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties.[5] Petitioner first contends that even though the ordinance does not expressly so provide, it should be read to prohibit discharge for any other reason, and therefore to confer tenure on all permanent employees. In addition, he contends that his period of service, together with his "permanent" classification, gave him a sufficient expectancy of continued employment to constitute a protected property interest.

A property interest in employment can, of course, be created by ordinance, or by an implied contract.[6] In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.[7]

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[5] Article II, § 6, of the Personnel Ordinance of the city of Marion, reads as follows:

"*Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice."

[6] In *Perry* v. *Sindermann*, 408 U. S. 593, 601, the Court said that a "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

[7] "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U. S. 564, 577.

The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. *Still* v. *Lance*, 279 N. C. 254, 182 S. E. 2d 403 (1971). Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question.

On its face the ordinance on which petitioner relies may fairly be read as conferring such a guarantee. However, such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures.[8] We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years. Based on his understanding of state law, he concluded that petitioner "held his position at the will and pleasure of the city."[9] This construction of North

[8] This is not the construction which six Members of this Court placed on the federal regulations involved in *Arnett* v. *Kennedy*, 416 U. S. 134. In that case the Court concluded that because the employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection. In this case, a holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had *no* property interest. The Court's evaluation of the federal regulations involved in *Arnett* sheds no light on the problem presented by this case.

[9] "Under the law in North Carolina, nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party irrespective of the quality of performance by the other party. By statute, G. S. § 115–142 (b), a county board of education in North Carolina may terminate the employment of a teacher at

Carolina law was upheld by the Court of Appeals for the Fourth Circuit, albeit by an equally divided court. In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.[10]

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the end of the school year without filing charges or giving its reasons for such termination, or granting the teacher an opportunity to be heard. *Still* v. *Lance*, 279 N. C. 254, 182 S. E. 2d 403 (1971).

"It is clear from Article II, Section 6, of the City's Personnel Ordinance, that the dismissal of an employee does not require a notice or a hearing. Upon request of the discharged employee, he shall be given written notice of his discharge setting forth the effective date and the reasons for the discharge. It thus appears that both the city ordinance and the state law have been complied with.

"It further appears that the plaintiff held his position at the will and pleasure of the city." 377 F. Supp., at 504.

[10] See *United States* v. *Durham Lumber Co.*, 363 U. S. 522. In *Propper* v. *Clark*, 337 U. S. 472, 486–487, the Court stated: "The precise issue of state law involved, *i. e.*, whether the temporary receiver under § 977–b of the New York Civil Practice Act is vested with title by virtue of his appointment, is one which has not been decided by the New York courts. Both the District Court and the Court of Appeals faced this question and answered it in the negative. In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." In *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 629–630, the Court stated: "Petitioner makes an extended argument to the effect that *Duke Power Co.* [v. *State Board*, 129 N. J. L. 449, 30 A. 2d 416, 131 N. J. L. 275, 36 A. 2d 201,] is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.' *Huddleston* v. *Dwyer*, 322 U. S. 232, 237. We are unable to say that the District Court and the Circuit Court of Appeals erred in applying to this case the rule of *Duke Power Co.* v. *State Board*, which involved closely analogous facts." And in *MacGregor* v. *State Mut. Life Assur. Co.*,

In this case, as the District Court construed the ordinance, the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case. The District Court's reading of the ordinance is tenable; it derives some support from a decision of the North Carolina Supreme Court, *Still* v. *Lance, supra;* and it was accepted by the Court of Appeals for the Fourth Circuit. These reasons are sufficient to foreclose our independent examination of the state-law issue.

Under that view of the law, petitioner's discharge did not deprive him of a property interest protected by the Fourteenth Amendment.

II

Petitioner's claim that he has been deprived of liberty has two components. He contends that the reasons given for his discharge are so serious as to constitute a stigma that may severely damage his reputation in the community; in addition, he claims that those reasons were false.

In our appraisal of petitioner's claim we must accept his version of the facts since the District Court granted summary judgment against him.[11] His evidence estab-

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315 U. S. 280, 281, the Court stated: "No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

[11] In granting summary judgment for respondents, the District Court was required to resolve all genuine disputes as to material facts in favor of petitioner. Fed. Rule Civ. Proc. 56 (c); *Arnett* v. *Kennedy, supra,* at 139–140.

lished that he was a competent police officer; that he was respected by his peers; that he made more arrests than any other officer on the force; that although he had been criticized for engaging in high-speed pursuits, he had promptly heeded such criticism; and that he had a reasonable explanation for his imperfect attendance at police training sessions. We must therefore assume that his discharge was a mistake and based on incorrect information.

In *Board of Regents* v. *Roth*, 408 U. S. 564, we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far "to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.*, at 575. This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.

In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honor, or integrity" [12] was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. A con-

[12] See *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437, and the discussion of the interest in reputation allied to employment in *Paul* v. *Davis*, 424 U. S. 693.

trary evaluation of either explanation would penalize forthright and truthful communication between employer and employee in the former instance, and between litigants in the latter.

Petitioner argues, however, that the reasons given for his discharge were false. Even so, the reasons stated to him in private had no different impact on his reputation than if they had been true. And the answers to his interrogatories, whether true or false, did not cause the discharge. The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired.[13] A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake.

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.[14] We must accept the

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[13] Indeed, the impact on petitioner's constitutionally protected interest in liberty is no greater even if we assume that the City Manager deliberately lied. Such fact might conceivably provide the basis for a state-law claim, the validity of which would be entirely unaffected by our analysis of the federal constitutional question.

[14] The cumulative impression created by the three dissenting opinions is that this holding represents a significant retreat from settled practice in the federal courts. The fact of the matter, however, is that the instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare. The reason is clear. For unless we were to adopt MR. JUSTICE BRENNAN'S remarkably innovative suggestion that we develop a federal common law of property rights, or his equally far-reaching view that almost every discharge implicates a constitutionally protected liberty interest, the

harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

The judgment is affirmed.

So ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Petitioner was discharged as a policeman on the grounds of insubordination, "causing low morale," and "conduct unsuited to an officer." *Ante,* at 343. It is difficult to imagine a greater "badge of infamy" that could be imposed on one following petitioner's calling; in a profession in which prospective employees are invariably investigated, petitioner's job prospects will be severely constricted by the governmental action in this case. Although our case law would appear to require that petitioner thus be accorded an opportunity "to clear his name" of this calumny, see, *e. g., Board of Regents* v. *Roth,* 408 U. S. 564, 573, and n. 12 (1972); *Arnett* v. *Kennedy,* 416 U. S. 134, 157 (1974) (opinion

ultimate control of state personnel relationships is, and will remain, with the States; they may grant or withhold tenure at their unfettered discretion. In this case, whether we accept or reject the construction of the ordinance adopted by the two lower courts, the power to change or clarify that ordinance will remain in the hands of the City Council of the city of Marion.

of REHNQUIST, J.), the Court condones this governmental action and holds that petitioner was deprived of no liberty interest thereby.

Paul v. *Davis*, 424 U. S. 693 (1976), a decision overtly hostile to the basic constitutional safeguards of the Due Process Clauses of the Fifth and Fourteenth Amendments that I had hoped would be a "short-lived aberration," *id.*, at 735 (BRENNAN, J., dissenting), held that the "interest in reputation asserted in [*Paul*] is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Id.*, at 712. Accordingly, it found inapplicable the rule that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437 (1971), and cases cited therein. In so holding, the Court eviscerated the substance of a long line of prior cases, see, *e. g.*, *Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123 (1951); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961); *Board of Regents* v. *Roth*, *supra*, by confining their protection of "liberty" to situations in which the State inflicts damage to a government employee's "good name, reputation, honor, or integrity" in the process of terminating his employment. See *Paul* v. *Davis*, *supra*, at 708. Compare *id.*, at 709, 710, with *id.*, at 732–733 (BRENNAN, J., dissenting).[1] Today the Court effectively destroys even that last vestige of protection for "liberty" by holding that a State may tell an employee that he is being fired for some nonderogatory reason, and then turn around and inform prospective employers that the em-

[1] The Court in *Paul* also ignored the clear import of *Goss* v. *Lopez*, 419 U. S. 565 (1975); *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971); and *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). See *Paul* v. *Davis*, 424 U. S., at 729–733 (BRENNAN, J., dissenting).

ployee was in fact discharged for a stigmatizing reason that will effectively preclude future employment.

The Court purports to limit its holding to situations in which there is "no public disclosure of the reasons for the discharge," *ante*, at 348, but in this case the stigmatizing reasons have been disclosed, and there is no reason to believe that respondents will not convey these actual reasons to petitioner's prospective employers.[2] The Court responds by asserting that since the stigma was imposed "after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim." *Ibid.* But the "claim" does not arise until the State has officially branded petitioner in some way, and the purpose of the due process hearing is to accord him an opportunity to clear his name; merely because the derogatory information is filed in respondents' records and no "publication" occurs until shortly after his discharge from employment does not subvert the fact that a postdeprivation hearing to accord petitioner an opportunity to clear his name has been contemplated by our cases.[3]

[2] It is only common sense, to be sure, that prospective employers will inquire as to petitioner's employment during the 33 months in which he was in respondents' service.

[3] The Court asserts that to provide petitioner with a postdeprivation hearing when the stigmatizing reasons become known during litigation "would penalize forthright and truthful communication . . . between litigants." *Ante*, at 349. Of course, there are various sanctions under our judicial system to ensure that testimony is "forthright and truthful" without necessitating denial of petitioner's due process rights. And I suppose the Court would declare that according a discharged employee a postdeprivation hearing as soon as it is clear his former employer is stigmatizing his name when it communicates with prospective employers would similarly discourage "forthright and truthful" communication between employers in that situation. However, the purpose of the due process hearing is to provide petitioner a mechanism for clearing his name of a cloud that is not in fact "truthful."

Even under *Paul* v. *Davis,* respondents should be required to accord petitioner a due process hearing in which he can attempt to vindicate his name; this further expansion of those personal interests that the Court simply writes out of the "life, liberty, or property" Clauses of the Fifth and Fourteenth Amendments is simply another curtailment of precious constitutional safeguards that marks too many recent decisions of the Court.

I also fully concur in the dissenting opinions of MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN, which forcefully demonstrate the Court's error in holding that petitioner was not deprived of "property" without due process of law. I would only add that the strained reading of the local ordinance, which the Court deems to be "tenable," *ante,* at 347, cannot be dispositive of the existence *vel non* of petitioner's "property" interest. There is certainly a federal dimension to the definition of "property" in the Federal Constitution; cases such as *Board of Regents* v. *Roth, supra,* held merely that "property" interests encompass those to which a person has "a legitimate claim of entitlement," 408 U. S., at 577, and *can* arise from "existing rules or understandings" that derive from "an independent source *such* as state law." *Ibid.* (emphasis supplied). But certainly, at least before a state law is definitively construed as not securing a "property" interest, the relevant inquiry is whether it was objectively reasonable for the employee to believe he could rely on continued employment. Cf. *ibid.* ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." [4]) At a minimum, this would require in this

[4] By holding that States have "unfettered discretion" in defining "property" for purposes of the Due Process Clause of the Federal Constitution, see *ante,* at 349–350, n. 14, the Court is, as my Brother WHITE argues, effectively adopting the analysis rejected by a major-

case an analysis of the common practices utilized and the expectations generated by respondents, and the manner in which the local ordinance would reasonably be read by respondents' employees.[5] These disputed issues of fact are not meet for resolution, as they were on summary judgment, and would thus at a minimum require a remand for further factual development in the District Court.

These observations do not, of course, suggest that a "federal court is . . . the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Ante*, at 349. However, the federal courts *are* the appropriate forum for ensuring that the constitutional mandates of due process are followed by those agencies of government making personnel decisions that pervasively influence the lives of those affected thereby; the fundamental premise of the Due Process Clause is that those procedural safeguards will help the government avoid the "harsh fact" of "incorrect or ill-advised personnel decisions." *Ante*, at 350.

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ity of the Court in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). More basically, the Court's approach is a resurrection of the discredited rights/privileges distinction, for a State may now avoid all due process safeguards attendant upon the loss of even the necessities of life, cf. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), merely by labeling them as not constituting "property." See also, *e. g.*, *Bell* v. *Burson*, 402 U. S. 535 (1971); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972).

[5] For example, petitioner was hired for a "probationary" period of six months, after which he became a "permanent" employee. No reason appears on the record for this distinction, other than the logical assumption, confirmed by a reasonable reading of the local ordinance, that after completion of the former period, an employee may only be discharged for "cause." As to respondents' personnel practices, it is important to note that in a department which currently employs 17 persons, petitioner's was the only discharge, for cause or otherwise, during the period of over three years from the time of his hiring until the time of pretrial discovery.

Petitioner seeks no more than that, and I believe that his "property" interest in continued employment and his "liberty" interest in his good name and reputation dictate that he be accorded procedural safeguards before those interests are deprived by arbitrary or capricious government action.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

I dissent because the decision of the majority rests upon a proposition which was squarely addressed and in my view correctly rejected by six Members of this Court in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974).

Petitioner Bishop was a permanent employee of the Police Department of the city of Marion, N. C. The city ordinance applicable to him provides:

> "*Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. *If* a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice." (Emphasis added.)

The second sentence of this ordinance plainly conditions petitioner's dismissal on cause—*i. e.*, failure to perform up to standard, negligence, inefficiency, or unfitness to perform the job. The District Court below did not otherwise construe this portion of the ordinance. In the only part of its opinion rejecting petitioner's claim that the ordinance gave him a property interest in his job,

the District Court said, in an opinion predating this Court's decision in *Arnett* v. *Kennedy*, *supra*:

> "It is clear from Article II, Section 6, of the City's Personnel Ordinance, that the dismissal of an employee does not require a notice or a hearing. Upon request of the discharged employee, he shall be given written notice of his discharge setting forth the effective date and the reasons for the discharge. It thus appears that both the city ordinance and the state law have been complied with." 377 F. Supp. 501, 504 (WDNC 1973).

Thus in concluding that petitioner had no "property interest" in his job entitling him to a hearing on discharge and that he held his position "at the will and pleasure of the city," *ibid.*, the District Court relied on the fact that the ordinance described its own *procedures* for determining cause, which procedures did not include a hearing. The majority purports, *ante*, at 345, and n. 8, to read the District Court's opinion as construing the ordinance *not* to condition dismissal on cause, and, if this is what the majority means, its reading of the District Court's opinion is clearly erroneous for the reasons just stated.[1] However, later in its opinion the majority ap-

[1] The Court accepts the District Court's conclusion that the city employee holds his position at the will and pleasure of the city. If the Court believes that the District Court's conclusion did not rest on the procedural limitations in the ordinance, then the Court must construe the District Court's opinion—and the ordinance—as permitting, but not limiting, discharges to those based on the causes specified in the ordinance. In this view, discharges for other reasons or for no reason at all could be made. Termination of employment would in effect be within the complete discretion of the city; and for this reason the employee would have no property interest in his employment which would call for the protections of the Due Process Clause. As indicated in the text, I think this construction of the ordinance and of the District Court's opinion is in error.

pears to eschew this construction of the District Court's opinion and of the ordinance. In the concluding paragraph of its discussion of petitioner's property interest, the majority holds that since neither the ordinance nor state law provides for a hearing, or any kind of review of the City Manager's dismissal decision, petitioner had no enforceable property interest in his job. The majority concludes:

> "In this case, as the District Court construed the ordinance, the City Manager's *determination of the adequacy of the grounds for discharge* is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case. The District Court's reading of the ordinance is tenable . . . ." *Ante,* at 347. (Emphasis added.)

The majority thus implicitly concedes that the ordinance supplies the "grounds" for discharge and that the City Manager must determine them to be "adequate" before he may fire an employee. The majority's holding that petitioner had no property interest in his job in spite of the unequivocal language in the city ordinance that he may be dismissed only for certain kinds of cause rests, then, on the fact that state law provides no *procedures* for assuring that the City Manager dismiss him only for cause. The right to his job apparently given by the first two sentences of the ordinance is thus redefined, according to the majority, by the procedures provided for in the third sentence and as redefined is infringed only if the procedures are not followed.

This is precisely the reasoning which was embraced by only three and expressly rejected by six Members of this Court in *Arnett* v. *Kennedy, supra.* There a federal employee had "a statutory expectancy that he not be removed other than for 'such cause as will promote

the efficiency of [the] service.'" 416 U. S., at 151–152 (opinion of REHNQUIST, J., joined by BURGER, C. J., and STEWART, J.). The three Justices whose views were rejected by a majority of the Court went on to say:

> "But the very section of the statute which granted him that right . . . expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. . . ." *Id.*, at 152.

The three Justices went on:

> "Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest. . . ." *Id.*, at 155.

Accordingly they concluded that the Constitution imposed no independent procedural requirements.

This view was rejected by MR. JUSTICE POWELL in an opinion joined by MR. JUSTICE BLACKMUN.

> "The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of

the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, *not by legislative grace, but by constitutional guarantee.* While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . ." *Id.*, at 166–167. (Emphasis added.)

I, too, disagreed with the view stated in MR. JUSTICE REHNQUIST's opinion:

"I differ basically with the plurality's view that 'where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet,' and that 'the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest.' *Ante*, at 153–154, 155. The rationale of this position quickly leads to the conclusion that even though the statute requires cause for discharge, the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all, whether pretermination or post-termination." *Id.*, at 177–178.

The view was also rejected by MR. JUSTICE MARSHALL in an opinion joined by MR. JUSTICE BRENNAN and Mr. Justice Douglas in which it was correctly observed:

> "Accordingly, a majority of the Court rejects MR. JUSTICE REHNQUIST's argument that because appellee's entitlement arose from statute, it could be conditioned on a statutory limitation of procedural due process protections, an approach which would render such protection inapplicable to the deprivation of any statutory benefit—any 'privilege' extended by Government—where a statute prescribed a termination procedure, no matter how arbitrary or unfair. It would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process." *Id.*, at 211.

The views now expressed by the majority are thus squarely contrary to the views expressed by a majority of the Justices in *Arnett*. As MR. JUSTICE POWELL suggested in *Arnett*, they are also "incompatible with the principles laid down in *Roth* and *Sindermann*."[2] *Id.*, at 166. I would not so soon depart from these cases nor from the views expressed by a majority in *Arnett*. The ordinance plainly grants petitioner a right to his job unless there is cause to fire him. Having granted him such a right it is the Federal Constitution,[3]

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[2] *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and *Perry* v. *Sindermann*, 408 U. S. 593 (1972).

[3] The majority intimates, *ante*, at 345 n. 8, that the views of the three plurality Justices in *Arnett* v. *Kennedy* were rejected because the other six Justices disagreed on the question of how the federal *statute* involved in that case should be construed. This is incorrect. All Justices agreed on the meaning of the statute. As the remarks of the six Justices quoted above indicate, it was the constitutional

not state law, which determines the process to be applied in connection with any state decision to deprive him of it.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

I join MR. JUSTICE WHITE's dissent for I agree that the Court appears to be adopting a legal principle which specifically was rejected by a majority of the Justices of this Court in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974).

I also feel, however, that *Still* v. *Lance*, 279 N. C. 254, 182 S. E. 2d 403 (1971), the only North Carolina case cited by the Court and by the District Court, is by no means the authoritative holding on state law that the Court, *ante*, at 345, and n. 9, seems to think it is. In *Still* the Supreme Court of North Carolina considered a statute that contained no "for cause" standard for failure to renew a teacher's contract at the *end* of a school year. In holding that this provision did not create a continued expectation of employment, the North Carolina court noted that it "does not limit the right of the employer board to terminate the employment of a teacher at the

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significance of the statute on which the six disagreed with the plurality.

Similarly, here, I do not disagree with the majority or the courts below on the meaning of the state law. If I did, I might be inclined to defer to the judgments of the two lower courts. The state law says that petitioner may be dismissed by the City Manager only for certain kinds of cause and then provides that he will receive notice and an explanation, but no hearing and no review. I agree that as a matter of state law petitioner has no remedy no matter how arbitrarily or erroneously the City Manager has acted. This is what the lower courts say the statute means. I differ with those courts and the majority only with respect to the constitutional significance of an unambiguous state law. A majority of the Justices in *Arnett* v. *Kennedy*, stood on the proposition that the Constitution requires procedures *not* required by state law when the state conditions dismissal on "cause."

end of a school year to a specified cause or circumstance." 279 N. C., at 260, 182 S. E. 2d, at 407. This provision, the court observed, stood in sharp contrast with another provision of the statute relating to termination of employment *during* the school year and prescribing that when "it shall have been determined that the services of an employee are not *acceptable* for the remainder of the current school year" (emphasis added), *ibid.*, notice and hearing were required.

The Marion ordinance in the present case contains a "for cause" standard for dismissal and, it seems to me, is like that portion of the statute construed in *Still* pertaining to termination of employment during the year. As such, it plainly does not subject an employee to termination at the will and pleasure of the municipality, but, instead, creates a proper expectation of continued employment so long as he performs his work satisfactorily. At this point, the Federal Constitution steps in and requires that appropriate procedures be followed before the employee may be deprived of his property interest.

Syllabus

NEW HAMPSHIRE *v.* MAINE

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 64, Orig. Argued April 19, 1976—Decided June 14, 1976

Following institution of this original action by New Hampshire against Maine to locate the lateral marine boundary separating the States between the mouth of Portsmouth Harbor and the entrance to Gosport Harbor in the Isles of Shoals, a settlement agreement was reached and a joint motion was filed for entry of judgment by consent, together with a proposed decree, based on a stipulated record, which the Special Master concluded should be submitted to the Court, at the same time expressing the view that the decree was impermissible under *Vermont* v. *New York*, 417 U. S. 270, but recommending its entry if the Court concluded otherwise. Thereafter the Special Master declared the entire case, including the proposed consent decree, to be under submission. The States had agreed with the Special Master's conclusion that King George II's decree of 1740 fixed the boundary in the Piscataqua (now Portsmouth) Harbor area but had differed over the location of certain points by the terms of the decree. The consent decree embodied the States' agreement upon the meaning of those terms. *Held:*

1. Entry of the consent decree proposes a wholly permissible final resolution of the controversy both as to the facts and the law and comports with the Court's Art. III function. The States' agreement can therefore be effectuated. The proposed decree in *Vermont* v. *New York*, *supra*, provided that "no findings shall be made" and that "it shall not constitute an adjudication of any issue of fact or law, or evidence, or any admission by any party with respect to any such issue," whereas the proposed consent decree here records the States' agreement as to the meaning and extent of hitherto imprecisely described locations in line with the relevant evidence; nor is anything like the "arbitral" function for resolution of future disputes in *Vermont* v. *New York* involved in the proposed consent decree here. Pp. 367–369.

2. Adoption of the proposed consent decree does not involve a compact under Art. I, § 10, cl. 3, requiring the consent of Congress. The application of that Clause is limited to agreements "directed to the formation of any combination tending to the increase of political power in the States, which may encroach

upon . . . the just supremacy of the United States," *Virginia* v. *Tennessee*, 148 U. S. 503, 519. Here the litigant States are not adjusting the boundary between them, which was fixed by the 1740 decree; the consent decree simply locates precisely the already existing boundary, and neither State is enhancing its power and threatening supremacy of the Federal Government. Pp. 369–370.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 370.

Richard F. Upton argued the cause for plaintiff on exceptions to the Report of the Special Master. With him on the briefs were *Warren B. Rudman*, Attorney General of New Hampshire, and *David H. Souter*, Deputy Attorney General.

Edward F. Bradley, Jr., Assistant Attorney General of Maine, argued the cause for defendant on exceptions to the Report. With him on the briefs were *Joseph E. Brennan*, Attorney General, and *Donald G. Alexander* and *Robert J. Stolt*, Assistant Attorneys General.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Both New Hampshire and Maine have filed exceptions to the Report of the Special Master in this original action brought by New Hampshire against Maine, 414 U. S. 810, 996 (1973), to locate the lateral marine boundary separating the States between the mouth of Portsmouth Harbor and the entrance to Gosport Harbor in the Isles of Shoals.[1] Prior to trial the At-

**Stephen R. Katz* filed a brief for the New Hampshire Commercial Fishermen's Assn. as *amicus curiae*.

[1] The controversy arose out of a dispute over lobster fishing in the seabed. Maine's regulatory laws, if applicable, are more restrictive than those of New Hampshire. For example, Maine requires a license, available only to Maine residents, for the taking

torneys General of New Hampshire and Maine agreed upon a settlement and jointly filed a "Motion for Entry of Judgment by Consent of Plaintiff and Defendant," together with a proposed consent decree, based on a stipulated record.[2] The Special Master thereafter, without further hearing but with supplemental briefs, declared the entire case, including the proposed consent decree, to be under submission.

The Special Master "concluded that the proposed consent decree should be submitted to the Court for its consideration," Report of Special Master 3, but expressed the view that rejection of the decree must be recommended as not permissible under the principle of *Vermont* v. *New York*, 417 U. S. 270, 277 (1974), that "mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Art. III functions" do not relieve the Court of its constitutional duty to decide the merits of the controversy between the States. However, the Special Master recommended entry of the consent decree if its entry would be consistent with performance of the Court's Art. III function.[3] We hold that entry of the

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of lobsters in Maine waters. Me. Rev. Stat. Ann. tit. 12, § 4404 (Supp. 1975–1976). Maine also imposes stricter minimum- and maximum-size requirements. Compare Me. Rev. Stat. Ann. tit. 12, § 4451 (1964), with N. H. Rev. Stat. Ann. § 211:27 (Supp. 1975). Before the original action was filed, efforts to settle the dispute failed, and violence over lobster fishing rights in the area was threatened.

[2] A motion to intervene on behalf of the New Hampshire Commercial Fishermen's Association was denied by the Special Master, but leave to proceed as *amicus curiae* was granted.

[3] As noted by the Special Master, a resolution of the New Hampshire Legislature supported a different marine boundary. The joint motion in support of the consent decree states as follows:

"Counsel assure the Court that the requested disposition of this action has been fully explained to the Governor and Executive Coun-

consent decree is consistent with that function. We therefore sustain Maine's exception to the rejection of the proposed consent decree. Accordingly, we have no occasion to address the other exceptions filed by the States.

The boundary in dispute was in fact fixed in 1740 by decree of King George II of England. That decree set the boundary as follows:

> "That the Dividing Line shall pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River .... And that the Dividing Line shall part the Isles of Shoals and run thro the Middle of the Harbour between the Islands to the Sea on the Southerly Side...."

The historical events that produced this 1740 decree, summarized briefly here, are detailed in the Special Master's Report. In the early 18th century, a major boundary dispute arose between the provinces of New Hampshire and Massachusetts regarding the southern border of New Hampshire. The legal issues focused on the Merrimack River, but the boundary between New Hampshire and the Maine portion of Massachusetts was also involved. When representatives of the two provinces were unable in 1731 to reach agreement, the New Hampshire representatives presented the matter to King George II. The King referred the dispute to the Board of Trade, which in 1735 recommended that commissioners from the other New England Colonies be designated to resolve the question. In 1737 the King ac-

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cil of each State by its Counsel and that the Governor and Executive Council of each State approve the requested disposition of this action."

No contention has been made that under New Hampshire law legislative approval or disapproval renders the New Hampshire consent ineffective.

cordingly appointed 20 members of the Provincial Councils of New York, New Jersey, Rhode Island, and Nova Scotia to serve as commissioners. Although much of the debate related only to the Merrimack question, the Piscataqua boundary between Maine and New Hampshire was also a point of controversy. The commission rendered its decision later that year, but both provinces appealed the decision to the King. In 1738 the King referred the matter to the Lords of the Committee of the Privy Council for Hearing Appeals from the Plantations, which recommended acceptance of the commission's resolution without change. In 1740 King George II signed a decree accepting this recommendation and, employing the quoted language, thereby permanently fixed the Maine-New Hampshire boundary. This boundary was the fixed boundary when the Union, including Massachusetts and New Hampshire, was formed, and when Maine was formally separated from Massachusetts and admitted to the Union.

The States expressly agree with the conclusion of the Special Master that "the decree of 1740 fixed the boundary in the Piscataqua Harbor area." Their quarrel was over the location by the decree of the "Mouth of Piscataqua River," "Middle of the River," and "Middle of the Harbour" within the contemplation of the decree. The proposed consent decree embodies the States' agreement upon the meaning of those terms, and we hold that the Court may give effect to the States' agreement consistently with performance of our Art. III function and duty.

The Special Master found that a "case or controversy" existed when this original action was filed, but that the effect of the compromise represented by the joint motion for entry of the consent decree was that "[a]t this point in time . . . the moving papers do not propose a case or

controversy in which the Court might apply 'principles of law or equity to the facts, distilled by hearings or stipulations.' [*Vermont* v. *New York, supra,* at 277.]" Report of Special Master 3–4. This was true of the circumstances before the Court in *Vermont* v. *New York,* but it is not true of the circumstances before the Court in this case.

The proposed consent decree in *Vermont* provided that "no findings shall be made" and that "it shall not constitute an adjudication on any issue of fact or law, or evidence, or any admission by any party with respect to any such issue." 417 U. S., at 271. The decree also provided for appointment by the Court of a Special Master authorized to consider all future disputes, after exhaustion of administrative and other remedies, and to file recommendations with the Court; these recommendations were to become decisions of the Court unless disapproved. Obviously this proposal "would materially change the function of the Court in these interstate contests." *Id.,* at 277. If we were to agree to police prospectively the conduct of the parties, "we would be acting more in an arbitral rather than a judicial manner." *Ibid.*

In contrast, the 1740 decree, not the proposed consent decree, permanently fixed the boundary between the States; the proposed consent decree does nothing except record the States' agreement upon the location of the "Mouth of Piscataqua River," "Middle of the River," and "Middle of the Harbour" within the contemplation of the 1740 decree. The consent decree expressly states that it "determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor in the Isles of Shoals."

The consent decree therefore proposes a wholly permissible final resolution of the controversy both as to

facts and law. Nothing remotely resembling "arbitral" rather than "judicial" functions is involved, unlike the proposed consent decree in *Vermont* v. *New York*. Moreover, there is nothing to suggest that the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence, and we therefore see no reason not to give it effect, even if we would reach a different conclusion upon the same evidence. The nature of the dispute is such that the States' resolution of it does not fall into the category of agreements that we reject because acceptance would not be consistent with our Art. III function and duty. *Vermont* v. *New York* does not proscribe the acceptance of settlements between the States that merely have the effect, as here, of reasonably investing imprecise terms with definitions that give effect to a decree that permanently fixed the boundary between the States.

New Hampshire suggests, however, that acceptance of the consent decree without an independent determination by the Court as to the validity of the legal principles on which it is based would be a circumvention of the Compact Clause, Art. I, § 10, cl. 3. The premise of this argument is that the proposed settlement is an "Agreement or Compact" within the meaning of the Clause and thus requires the consent of Congress to be effective. We disagree.

The application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Virginia* v. *Tennessee*, 148 U. S. 503, 519 (1893). Whether a particular agreement respecting boundaries is within the Clause will depend on whether "the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected,

and thus encroach or not upon the full and free exercise of Federal authority." *Id.*, at 520. See *Wharton* v. *Wise*, 153 U. S. 155, 168–171 (1894).

The proposed consent decree plainly falls without the Compact Clause under this test. New Hampshire and Maine are not here adjusting the boundary between them; the boundary was fixed over two centuries ago by the 1740 decree, and the consent decree is directed simply to locating precisely this already existing boundary. Accordingly, neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government. The boundary defined by the proposed decree "takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary." *Virginia* v. *Tennessee*, *supra*, at 522. See *North Carolina* v. *Tennessee*, 235 U. S. 1, 15–16 (1914).

The proposed consent decree will be entered.

So ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS join, dissenting.

I find unacceptable the Court's cursory conclusion that the Special Master and we ourselves are bound to accept the agreement of the parties as to the meaning of the words "middle of the river" and related phrases which were used in the 1740 document to describe the Maine-New Hampshire boundaries, as well as their agreement as to where that line lies on the face of the earth.

The parties interpret "middle of the river" as meaning the thalweg, which they understand to be the middle of the main channel of navigation. The States then fashioned their mutually agreed boundary in the river and the harbor on this basis, their boundary in the ocean being a straight line between the points at which the main navigation channels cross the closing lines of

Portsmouth and Gosport Harbors. No inquiry is made, however, by either the Court or the parties as to whether the "middle of the river" has, or had, any commonly understood meaning in the law. The Special Master concluded that these words, when used in 1740, intended to describe the geographic middle of the river—a line all points of which were equidistant from the nearest points on the shores. This was the meaning given to very similar words in *Texas* v. *Louisiana,* 410 U. S. 702 (1973); and it seems incredible to me that however correct the Special Master may be in this regard—and the Court does not even imply that he is wrong—he must nevertheless accept the parties' agreement that the middle of the river is the middle of the main channel of navigation.

The Court's holding seems to be that *whatever* the parties might agree to with respect to the import of the 1740 language, the Special Master and the courts must give their imprimatur. As I understand the Court, the stipulation would have been just as acceptable and just as binding upon us if the parties had agreed that the middle of the river was intended to mean the geographical center of the stream.

I agree with the contrary view of the Special Master that the middle-of-the-river language should be determined in accordance with legal principles, not by agreements of convenience. The Special Master concluded that when the language involved was employed in 1740 the geographic middle rather than the thalweg or main channel of the river was intended. The Court does not hold the Special Master to be wrong in this regard, and it would be difficult to believe that the "middle of the river" should be determined by what the main channel of navigation might turn out to be in the 1970's.

The parties agree that the geographic middle and the main channel of navigation are totally different concepts.

The map filed by the State of Maine in connection with its exceptions indicates the great difference it makes whether the stipulated boundary or the geographic middle is to rule this case. The State strongly objects to the latter because substantial areas both in the river and harbor and seaward would be lost to its neighbor, New Hampshire.

Furthermore, whether the middle of the river is to mean the thalweg or a line equidistant from the shores, the boundary should be laid out in accordance with the legal import of these concepts. This does not seem to be the case with respect to the stipulated boundary in the Piscataqua River and Portsmouth Harbor; for the agreed boundary proceeds on absolutely straight lines, and it is incredible that a line following the main or deepest channel would proceed on such an invariable course. What the parties have actually done is to agree upon a line which they assert represents the course most usually followed by those navigating the harbor and the river. This is not at all the same thing as a boundary following the thalweg.

I would not think that without the consent of Congress two States could agree to locate the boundary between them on either shore of the river separating them if the controlling document describes their boundary as the middle of the river; nor, if the document made it plain that the main channel in the river was their boundary line, would they be free to stipulate that the boundary should be the geographic center of the stream nor should a court approve any such stipulation. Rather it should determine and lay out the line in accordance with accepted legal principles and enter a decree accordingly. This is what the Special Master recommended that we do, and his Report should be accepted and a decree entered in accordance therewith.

Syllabus

BRYAN *v.* ITASCA COUNTY, MINNESOTA

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 75-5027. Argued April 20, 1976—Decided June 14, 1976

Petitioner, an enrolled Chippewa Indian, brought this suit in state court seeking a declaratory judgment that the State of Minnesota and respondent county lacked authority to impose a personal property tax on his mobile home located on land held in trust for members of his tribe and that imposition of such a tax contravened federal law. The trial court rejected the contention. The Minnesota Supreme Court affirmed, holding that the grant of civil jurisdiction to the State in § 4 (a) of Pub. L. 280 includes taxing authority and since § 4 (b) does not exempt nontrust property from such authority, the county had power to assess the tax. Section 4 (a) gave various States, including Minnesota, with respect to all Indian country within the State except as specifically exempted "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . ." Though tax laws are not specifically mentioned, the State Supreme Court concluded that they were included since the exempting provision, § 4 (b), does not exempt nontrust property, but states that "[n]othing in this section shall authorize the . . . taxation of any real or personal property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States . . . ." *Held:* Public Law 280 did not grant States the authority to impose taxes on reservation Indians. Pp. 379–393.

(a) The central focus of Pub. L. 280, embodied in § 2 of the Act, was to confer on the States criminal jurisdiction with respect to crimes involving Indians, and no mention was made of a congressional intent to authorize the States to tax Indians or Indian property on Indian reservations, a significant omission in light of applying the canons of construction to statutes affecting Indian immunities, where some mention would normally be expected had Congress contemplated a sweeping change in the status of reservation Indians. Pp. 379–383.

(b) Section 4 (a) seems to have been intended primarily to provide a state forum for resolving private legal disputes involving Indians. Pp. 383–386.

(c) When Title IV of the Civil Rights Act of 1968 amended Pub. L. 280 to require tribal consent to any new state jurisdiction Congress in effect characterized the relevant part of Pub. L. 280 as conferring the power to resolve private civil controversies, and the legislative history of Title IV would make it difficult to construe § 4 jurisdiction acquired pursuant to that Title as extending general state regulatory power, including taxing power, to govern Indian reservations. Pp. 386–387.

(d) Public L. 280 was plainly not meant to effect total assimilation, and nothing in its legislative history suggests otherwise. The same Congress that enacted Pub. L. 280 also enacted several termination Acts, indicating that Congress well knew how directly to express its intent to confer upon the States general civil regulatory powers, including taxation. Pp. 387–390.

(e) Section 4 (b), which is "entirely consistent with, and in effect . . . a reaffirmation of, the law as it stood prior to its enactment," *Kirkwood* v. *Arenas*, 243 F. 2d 863, 866 (CA9), should, as an admittedly ambiguous statute, be construed in favor of the Indians and against abolishing their tax immunities by implication. Pp. 390–393.

303 Minn. 395, 228 N. W. 2d 249, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Bernard P. Becker argued the cause for petitioner. With him on the brief were *Gerald L. Seck*, *Michael Hagedorn*, and *Daniel H. Israel*.

C. H. Luther, Deputy Attorney General of Minnesota, argued the cause for respondent. With him on the brief were *Warren Spannaus*, Attorney General, and *Paul R. Kempainen* and *Steven G. Thorne*, Special Assistant Attorneys General.*

**Solicitor General Bork*, *Assistant Attorney General Taft*, *Harry R. Sachse*, *Edmund B. Clark*, and *Jacques B. Gelin* filed a brief for the United States as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question reserved in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 178 n. 18 (1973): whether the grant of civil jurisdiction to the States conferred by § 4 of Pub. L. 280, 67 Stat. 589, 28 U. S. C. § 1360, is a congressional grant of power to the States to tax reservation Indians except insofar as taxation is expressly excluded by the terms of the statute.

Petitioner Russell Bryan, an enrolled member of the Minnesota Chippewa Tribe,[1] resides in a mobile home on land held in trust by the United States for the Chippewa Tribe on the Leech Lake Reservation in Minnesota. In June 1972, petitioner received notices from the auditor of respondent Itasca County, Minn., that he had been assessed personal property tax liability on the mobile home totaling $147.95. Thereafter, in September 1972, petitioner brought this suit in the Minnesota District Court seeking a declaratory judgment that the State and county were without authority to levy such a tax on personal property of a reservation Indian on the reservation and that imposition of such a tax was contrary to federal law. The Minnesota District Court rejected the contention and entered judgment for respondent county. The Minnesota Supreme Court affirmed, 303 Minn. 395, 228 N. W. 2d 249 (1975). We granted certiorari, 423 U. S. 923 (1975), and now reverse.

I

Principles defining the power of States to tax reserva-

[1] The Minnesota Chippewa Tribe is a federally recognized tribe with a constitution approved by the Secretary of the Interior. Memorandum for United States as *Amicus Curiae* 2 n. 2. Its reservation was established by the Treaty of Feb. 22, 1855, 10 Stat. 1165.

tion Indians and their property and activities on federally established reservations were clarified in *McClanahan* v. *Arizona State Tax Comm'n, supra.* As summarized in its companion case, *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145 (1973), *McClanahan* concluded:

> "[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* . . . lays to rest any doubt in this respect by holding that such taxation is not permissible absent Congressional consent." *Mescalero Apache Tribe* v. *Jones, supra,* at 148.[2]

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[2] The *McClanahan* principle derives from a general pre-emption analysis, 411 U. S., at 172, that gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes, *United States* v. *Mazurie,* 419 U. S. 544, 554 n. 11 (1975); *Morton* v. *Mancari,* 417 U. S. 535, 551–552 (1974); *Board of Comm'rs* v. *Seber,* 318 U. S. 705, 715–716 (1943), and "to regulate and protect the Indians and their property against interference even by a state," *id.,* at 715. This pre-emption analysis draws support from "the 'backdrop' of the Indian sovereignty doctrine," *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463, 475 (1976); "'[t]he policy of leaving Indians free from state jurisdiction and control [which] is deeply rooted in the Nation's history,'" *McClanahan,* 411 U. S., at 168; and the extensive federal legislative and administrative regulation of Indian tribes and reservations, *id.,* at 173–179. "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," *Williams* v. *Lee,* 358 U. S. 217, 220 (1959), and therefore "'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'" *McClanahan, supra,* at 170–171 (quoting United States Department of the Interior, Federal Indian Law 845 (1958)).

Of course, this pre-emption model usually yields different conclusions as to the application of state laws to tribal Indians who

McClanahan held that Arizona was disabled in the absence of congressional consent from imposing a state income tax on the income of a reservation Indian earned solely on the reservation. On the authority of *McClanahan, Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463 (1976), held this Term that in the absence of congressional consent the State was disabled from imposing a personal property tax on motor vehicles owned by tribal members living on the reservation, or a vendor license fee applied to a reservation Indian conducting a business for the tribe on reservation land, or a sales tax as applied to on-reservation sales by Indians to Indians.

Thus *McClanahan* and *Moe* preclude any authority in respondent county to levy a personal property tax upon petitioner's mobile home in the absence of congressional consent. Our task therefore is to determine whether § 4 of Pub. L. 280, 28 U. S. C. § 1360, constitutes such consent.

Section 4 (a), 28 U. S. C. § 1360 (a), provides:

> "Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . :
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> . . . . .

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have left or never inhabited federally established reservations, or Indians "who do not possess the usual accoutrements of tribal self-government," *McClanahan, supra,* at 167–168; see *Mescalero Apache Tribe,* 411 U. S., at 148–149.

> "Minnesota . . . All Indian country within the State, except the Red Lake Reservation."

The statute does not in terms provide that the tax laws of a State are among "civil laws . . . of general application to private persons or private property." The Minnesota Supreme Court concluded, however, that they were, finding in § 4 (b) of the statute a negative implication of inclusion in § 4 (a) of a general power of tax. Section 4 (b), 28 U. S. C. § 1360 (b), provides:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

The Minnesota Supreme Court reasoned that "unless paragraph (a) is interpreted as a general grant of the power to tax, then the exceptions contained in paragraph (b) are limitations on a nonexistent power." 303 Minn., at 402, 228 N. W. 2d, at 253.[3] Therefore, the state court held: "Public Law 280 is a clear grant of the power

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[3] The State Supreme Court relied upon *Omaha Tribe of Indians* v. *Peters*, 382 F. Supp. 421 (1974), aff'd, 516 F. 2d 133 (CA8 1975), where the District Court for the District of Nebraska gave the same construction to Pub. L. 280 in upholding a state income tax levied against reservation Indian income.

to tax." *Id.*, at 406, 228 N. W. 2d, at 256.[4] We disagree. That conclusion is foreclosed by the legislative history of Pub. L. 280 and the application of canons of construction applicable to congressional statutes claimed to terminate Indian immunities.

II

The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement. See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U. C. L. A. L. Rev. 535, 541–542 (1975). The House Report states:

> "These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions. The applicability of Federal criminal laws in States having Indian reservations is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.
>
> "As a practical matter, the enforcement of law

[4] Petitioner had not properly raised a claim that his mobile home was in fact annexed to tribal trust land and therefore a part of the real property expressly excluded from taxation by § 4 (b). The Minnesota Supreme Court found, therefore, that the mobile home was personal property taxable as such under Minnesota law.

> and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility." H. R. Rep. No. 848, 83d Cong., 1st Sess., 5–6 (1953).[5]

Thus, provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 and is embodied in § 2 of the Act, 18 U. S. C. § 1162.[6]

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[5] This House Report and the Senate Report, S. Rep. No. 699, 83d Cong., 1st Sess. (1953), are in all material respects identical. All citations herein are to the House Report.

[6] Section 2 of Pub. L. 280, 18 U. S. C. § 1162, provides:

"State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
. . .	. . .
"Minnesota.....	All Indian country within the State, except the Red Lake Reservation.
. . .	. . .

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or com-

In marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting § 4's grant of civil jurisdiction to the States. Of special significance for our purposes, however, is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. Neither the Committee Reports nor the floor discussion in either House mentions such authority.[7] This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.[8] The only mention of taxation authority is in a colloquy between Mr. Sellery, Chief Counsel of the Bureau of Indian Affairs, and Congressman Young during House committee hearings on Pub. L. 280. That colloquy strongly suggests that Congress did not mean to grant tax authority to the States:

"Mr. Young. Does your bill limit the provision

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munity that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction."

[7] 99 Cong. Rec. 9962, 10782–10784, 10928 (1953).

[8] See Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 N. D. L. Rev. 267, 292 (1973).

for Federal assistance to States in defraying the increased expenses of the courts in connection with the widening of the jurisdiction that the bill encompasses?

"Mr. Sellery. No; it does not.

"Mr. Young. Do you think it would be necessary to provide for some payment, inasmuch as the great portion of Indian lands are not subject to taxation?

"Mr. Sellery. . . . Generally, the Department's views are that if we started on the processes of Federal financial assistance or subsidization of law enforcement activities among the Indians, it might turn out to be a rather costly program, and it is a problem which the States should deal with and accept without Federal financial assistance; otherwise there will be some tendency, the Department believes, for the Indian to be thought of and perhaps to think of himself because of the financial assistance which comes from the Federal Government as still somewhat a member of a race or group which is set apart from other citizens of the State. And it is desired to give him and the other citizens of the State the feeling of a conviction that he is in the same status and has access to the same services, including the courts, as other citizens of the State who are not Indians.

"Mr. Young. That would not quite be true, though; would it? Because for the most part he does not pay any taxes.

"Mr. Sellery. No. There is that difference.

"Mr. Young. A rather sizable difference in not paying for the courts or paying for the increased expenses for judicial proceedings.

"Mr. Sellery. The Indians, of course, do pay other forms of taxes. I do not know how the courts

of Nevada are supported financially, but the Indians do pay the sales tax and other taxes.

"Mr. Young. But no income tax or corporation tax or profits tax. You understand a large portion of the land is held in trust and therefore is not subject to tax.

"Mr. Sellery. That is correct.

"Mr. Young. So far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only right that the Federal Government should make some contribution for that. You seem to differentiate. I think there is a differentiation, too, in that they are not paying taxes.

"Mr. Sellery. I will concede your point that they are not paying taxes. The Department has recommended, nevertheless, that no financial assistance be afforded to the States." App. 55–56.[9]

Piecing together as best we can the sparse legislative history of § 4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action." With this as the primary

[9] Unpublished Transcript of Hearings on H. R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953). The transcript was produced by the United States during the briefing of *Tonasket* v. *Washington*, 411 U. S. 451 (1973). The portion quoted in the text is reproduced in the Appendix in the instant case.

focus of § 4 (a), the wording that follows in § 4 (a)—"and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State"—authorizes application by the state courts of their rules of decision to decide such disputes.[10] Cf. 28 U. S. C. § 1652. This construction finds support in the consistent and uncontradicted references in the legislative history to "permitting" "*State courts to adjudicate* civil controversies" arising on Indian reservations, H. R. Rep. No. 848, pp. 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.[11] In

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[10] Cf. Israel & Smithson, *supra*, n. 8, at 296:

"A fair reading of these two clauses suggests that Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather that Congress intended 'civil laws' to mean those laws which have to do with private rights and status. Therefore, 'civil laws . . . of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws."

[11] Moreover, this interpretation is consistent with the title of Pub. L. 280, H. R. Rep. No. 848, p. 3: "A bill to confer jurisdiction on the States . . . , with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes" (the other purposes being § 8's withdrawal from the affected areas of the operation of the Federal Indian Liquor Laws, and §§ 6–7's provision of a method whereby additional States could assume civil and criminal jurisdiction over Indian reservations). Additionally, this interpretation is buttressed by § 4 (c), which provides that "any tribal ordinance or custom . . . adopted by an Indian tribe . . . in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect *in the determination of civil causes of action* pursuant to this section" (emphasis added). Fi-

short, the consistent and exclusive use of the terms "civil causes of action," "aris[ing] on," "civil laws . . . of general application to private persons or private property," and "adjudicat[ion]," in both the Act and its legislative history virtually compels our conclusion that the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court.

Furthermore, certain tribal reservations were completely exempted from the provisions of Pub. L. 280 precisely because each had a "tribal law-and-order organization that functions in a reasonably satisfactory manner." H. R. Rep. No. 848, p. 7.[12] Congress plainly

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nally, reading § 4 (a) as an integrated whole, with the reference to state civil law as intended to provide the rules of decision for the private civil causes of action over which state courts were granted jurisdiction is consistent with § 3 of Pub. L. 280, which codifies § 4 in Title 28 of the United States Code. That Title collects Acts of Congress governing jurisdiction and the judiciary. Section 4 would be expected to be codified in Title 25, governing Indian affairs if general state regulatory power over Indian reservations were being granted. Indeed, § 4 is entitled, as provided in Pub. L. 280 and codified at 28 U. S. C. § 1360, "State civil jurisdiction in actions to which Indians are parties."

[12] Tribal groups in the affected States which were exempted from the coverage of Pub. L. 280 because they had "reasonably satisfactory law-and-order" organizations, had objected to the extension of state criminal and civil jurisdiction on various grounds. Three of the tribes exempted objected due to their fear of inequitable treatment of reservation Indians in the state courts. H. R. Rep. No. 848, pp. 7–8. Two of the objecting tribes expressed the fear that "the extension of State law to their reservations would result in the loss of various rights." *Id.*, at 8. One tribe objected on the ground that its members were "not yet ready to be subjected to State laws." *Ibid.* Certainly if abolition of traditional Indian immunity from state taxation, except insofar as expressly excluded, was an anticipated result of Pub. L. 280's extension of civil jurisdiction, vehement Indian objections on this specific ground would also have been voiced.

meant only to allow state courts to decide criminal and civil matters arising on reservations not so organized. Accordingly, rather than the expansive reading given § 4 (a) by the Minnesota Supreme Court, we feel that the construction we give the section is much more consonant with the revealed congressional intent. Moreover, our construction is consistent with our prior references to § 4 as "the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country." *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 427 (1971). See also *id.*, at 424 n. 1; *id.*, at 430–431 (STEWART, J., dissenting); *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U. S. 685, 687 n. 3 (1965); *Menominee Tribe* v. *United States*, 391 U. S. 404, 416 n. 8 (1968) (STEWART, J., dissenting).

Our construction is also more consistent with Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U. S. C. §§ 1321–1326. Title IV repeals § 7 of Pub. L. 280 and requires tribal consent as a condition to further state assumptions of the jurisdiction provided in 18 U. S. C. § 1162 and 28 U. S. C. § 1360. Section 402 of Title IV, 25 U. S. C. § 1322, tracks the language of § 4 of Pub. L. 280. Section 406 of Title IV, 25 U. S. C. § 1326, which provides for Indian consent, refers to "State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action . . . ." It is true, of course, that the primary interpretation of § 4 must have reference to the legislative history of the Congress that enacted it rather than to the history of Acts of a later Congress. Nevertheless, Title IV of the 1968 Act is intimately related to § 4, as it provides the method for further state assumptions of the jurisdiction conferred by § 4, and we previously have construed the effect of legislation affecting reservation Indians in light of "intervening" legislative enactments. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S., at 472–475. It would be

difficult to suppose that Congress in 1968 intended the meaning of § 4 to vary depending upon the time and method by which particular States acquired jurisdiction. And certainly the legislative history of Title IV makes it difficult to construe § 4 jurisdiction acquired pursuant to Title IV as extending general state civil regulatory authority, including taxing power, to govern Indian reservations. Senator Ervin, who offered and principally sponsored Title IV, see *Kennerly* v. *District Court of Montana, supra,* at 429 n. 5, referred to § 1360 civil jurisdiction as follows:

> "Certain representatives of municipalities have charged that the repeal of [§ 7 of] Public Law 280 would hamper air and water pollution controls and provide a haven for undesirable, unrestricted business establishments within tribal land borders. Not only does this assertion show the lack of faith that certain cities have in the ability and desire of Indian tribes to better themselves and their environment, but, *most importantly, it is irrelevant, since Public Law 280 relates primarily to the application of state civil and criminal law in court proceedings,* and has no bearing on programs set up by the States to assist economic and environmental development in Indian territory." (Emphasis added.) Hearing before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, No. 90–23, 90th Cong., 2d Sess., 136 (1968).

III

Other considerations also support our construction. Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation. Public L. 280 was only one of many types of assimilationist legislation under active consideration

in 1953. H. R. Rep. No. 848, pp. 3–5; *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655, 662 (CA9 1975).[13] And nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than " 'private, voluntary organizations,' " *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975)—a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments.[14] The Act itself refutes such an

[13] The legislative history of Pub. L. 280 does contain a congressional expression that "the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country." H. R. Rep. No. 848, p. 6. But not too much can be made of this unelaborated statement; its thrust is too difficult to reconcile with the focus of Pub. L. 280—extending state jurisdiction to those reservations with the least developed and most inadequate tribal legal institutions; presumably those tribes evincing the least "acculturation and development" in terms of the mainstream of American society. See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U. C. L. A. L. Rev. 535, 543 (1975).

[14] Much has been written on the subject of a devastating impact on tribal governments that might result from an interpretation of § 4 as conferring upon state and local governments general civil regulatory control over reservation Indians. *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655, 662–663, 666–668 (CA9 1975); Goldberg, *supra;* Note, The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit, 25 Hastings L. J. 1451 (1974); Comment, Indian Taxation: Underlying Policies and Present Problems, 59 Calif. L. Rev. 1261 (1971). The suggestion is that since tribal governments are disabled under many state laws from incorporating as local units of government, Goldberg, *supra*, at 581, general regulatory control might relegate tribal governments to a level below

inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4 (c), 28 U. S. C. § 1360 (c), providing for the "full force and effect" of any tribal ordinances or customs "heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State," contemplates the continuing vitality of tribal government.

Moreover, the same Congress that enacted Pub. L. 280 also enacted several termination Acts [15]—legislation which is cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation. Cf. *Board of Comm'rs* v. *Seber,* 318 U. S. 705, 713 (1943); *Goudy* v. *Meath,* 203 U. S. 146, 149 (1906). These termination enactments provide expressly for subjecting distributed property "and any income derived therefrom by the individual, corporation, or other legal entity . . . to the same taxes, State and Federal, as in the case of non-Indians," 25 U. S. C.

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that of counties and municipalities, thus essentially destroying them, particularly if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation. Present federal policy appears to be returning to a focus upon strengthening tribal self-government, see, *e. g.,* Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.* (1970 ed., Supp. V); Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U. S. C. § 450 *et seq.* (1970 ed., Supp. V), and the Court of Appeals for the Ninth Circuit has expressed the view that courts "are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Santa Rosa Band of Indians* v. *Kings County, supra,* at 663.

[15] 68 Stat. 718, 25 U. S. C. § 564 (Klamath Tribe); 68 Stat. 768, 25 U. S. C. §§ 721–728 (Alabama and Coushatta Tribes of Texas); 68 Stat. 1099, 25 U. S. C. §§ 741–760 (Paiute Indians of Utah); 68 Stat. 250, 25 U. S. C. §§ 891–901 (Menominee Tribe of Wisconsin).

§§ 564j, 749, 898, and provide that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U. S. C. §§ 564q, 757, 899; cf. 25 U. S. C. § 726. These contemporaneous termination Acts are *in pari materia* with Pub. L. 280. *Menominee Tribe* v. *United States*, 391 U. S., at 411. Reading this express language respecting state taxation and application of the full range of state laws to tribal members of these contemporaneous termination Acts, the negative inference is that Congress did not mean in § 4 (a) to subject reservation Indians to state taxation. Thus, rather than inferring a negative implication of a grant of general taxing power in § 4 (a) from the exclusion of certain taxation in § 4 (b), we conclude that construing Pub. L. 280 *in pari materia* with these Acts shows that if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so.

IV

Additionally, we note that § 4 (b), excluding "taxation of any real or personal property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States," is not obviously the narrow exclusion of state taxation that the Minnesota Supreme Court read it to be. On its face the statute is not clear whether the exclusion is applicable only to taxes levied directly on the trust property specifically, or whether it also excludes taxation on activi-

ties taking place in conjunction with such property and income deriving from its use. And even if read narrowly to apply only to taxation levied against trust property directly, § 4 (b) certainly does not expressly authorize all other state taxation of reservation Indians.

Moreover, the express prohibition of any "alienation, encumbrance, or taxation" of any trust property can be read as prohibiting state courts, acquiring jurisdiction over civil controversies involving reservation Indians pursuant to § 4, from applying state laws or enforcing judgments in ways that would effectively result in the "alienation, encumbrance, or taxation" of trust property. Indeed, any other reading of this provision of § 4 (b) is difficult to square with the identical prohibition contained in § 2 (b) of the Act, which applies the same restrictions upon States exercising criminal jurisdiction over reservation Indians. It would simply make no sense to infer from the identical language of § 2 (b) a general power in § 2 (a) to tax Indians in all other respects since § 2 (a) deals only with criminal jurisdiction.

Indeed, § 4 (b) in its entirety may be read as simply a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians. We agree with the Court of Appeals for the Ninth Circuit that § 4 (b) "is entirely consistent with, and in effect is a reaffirmation of, the law as it stood prior to its enactment." *Kirkwood* v. *Arenas,* 243 F. 2d 863, 865–866 (1957). The absence of more precise language respecting state taxation of reservation Indians is entirely consistent with a general uncertainty in 1953 of the precise limits of state power to tax reservation Indians respecting other than their trust property, and a con-

gressional intent merely to reaffirm the existing law whatever subsequent litigation might determine it to be.[16]

Finally, in construing this "admittedly ambiguous" statute, *Board of Comm'rs* v. *Seber*, 318 U. S., at 713, we must be guided by that "eminently sound and vital canon," *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918). See *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912); *Antoine* v. *Washington*, 420 U. S. 194, 199–200 (1975). This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 174; *Squire* v. *Capoeman*, 351 U. S. 1, 6–7 (1956); *Carpenter* v. *Shaw*, 280 U. S. 363, 366–367 (1930). "This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 613–614 (1943) (Murphy, J., dissenting). What we recently said of a claim that

[16] Congress would have been fully justified in 1953 in being uncertain as to state power to levy a personal property tax on reservation Indians. No decision of this Court directly resolved the issue until *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), decided earlier this Term. It appears that the only decision of this Court prior to 1953 dealing with state power to levy a personal property tax on reservation Indians was *United States* v. *Rickert*, 188 U. S. 432, 443–444 (1903), which held exempt from state taxation personal Indian property purchased with federal funds. See United States Department of the Interior, Federal Indian Law 865 (1958).

Congress had terminated an Indian reservation by means of an ambiguous statute is equally applicable here to the respondent's claim that § 4 (a) of Pub. L. 280 is a clear grant of power to tax, and hence a termination of traditional Indian immunity from state taxation:

> "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the . . . Act. This being so, we are not inclined to infer an intent to terminate . . . . A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U. S. 481, 504–505 (1973).

The judgment of the Minnesota Supreme Court is

Reversed.

KERR ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–1023. Argued November 11, 1975—Decided June 14, 1976

In a class action by California state prisoners on behalf of themselves and all present or future adult male felons in California state prisons or on parole, plaintiffs alleged constitutional violations in the manner in which the members of the California Adult Authority and other petitioners determine the length of detention and conditions of punishment for convicted offenders, and sought declaratory and injunctive relief. In the course of discovery pursuant to Fed. Rule Civ. Proc. 34 plaintiffs sought (1) Adult Authority files consisting, *inter alia*, of personnel files of all members and employees of the Adult Authority; and (2) prisoners' files, consisting of the files of every twentieth inmate in each state correctional institution. Petitioners, claiming that the Adult Authority files were irrelevant, confidential, and privileged, suggested that they should not be compelled to turn over the files without prior District Court *in camera* inspection. That court ordered the production of the documents without such review but limited the number of people associated with the plaintiffs who might examine the documents. Petitioners then filed a petition for mandamus to vacate the discovery order, which the Court of Appeals denied. Though recognizing a qualified governmental "official or state secrecy privilege," the court indicated that, contrary to the situation here, assertion of such a privilege had to be made with specificity by high-level Adult Authority officials. A somewhat similar course ensued with regard to the prisoners' files, ending with the Court of Appeals' denial of mandamus without opinion. *Held:* In the circumstances of this case—and particularly since less extreme alternatives for modification of the challenged discovery orders were available—issuance of the writ of mandamus is inappropriate. Pp. 402–406.

(a) As a means of implementing the rule that mandamus will issue only in extraordinary circumstances, the party seeking this largely discretionary writ must show that there are no other adequate means to secure the desired relief. Pp. 402–403.

(b) Here adequate alternatives to mandamus existed. The Court of Appeals' opinion did not foreclose *in camera* review, but apparently left open the opportunity for petitioners through responsible officials to assert the privilege more specifically and have their request for *in camera* review reconsidered. They thus have an avenue far short of mandamus to achieve the relief they seek, and this approach affords an appropriate and useful method for achieving a balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents. Pp. 404–406.

(c) There is no reason to believe that by its order relating to the discovery of the prisoners' files the Court of Appeals meant to foreclose petitioners from availing themselves of the same opportunity of securing *in camera* review as is available in the case of the Adult Authority files. P. 406.

511 F. 2d 192, and order of Dec. 18, 1974 (unreported), affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Karl S. Mayer, Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Derald E. Granberg*, *John T. Murphy*, *Jean M. Bordon*, Deputy Attorneys General, and *Edward P. O'Brien*, Assistant Attorney General.

B. E. Bergesen III argued the cause for respondents. With him on the brief was *Sidney M. Wolinsky*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioners, defendants in a class action, sought issuance of writs of mandamus from the United States Court of Appeals for the Ninth Circuit to compel the District Court to vacate two discovery orders. The Court of Appeals refused to issue the writs. We hold that in the circumstances of this case—and particularly in light of

the availability of an alternative, less extreme, path to modification of the challenged discovery orders—issuance of the writ is inappropriate. We therefore affirm.

I

Seven prisoners in the custody of the Department of Corrections of the State of California filed a class action in the United States District Court for the Northern District of California on behalf of themselves and "on behalf of all adult male felons who now are, as well as all adult male felons who in the future will be, in the custody of the California Department of Corrections, whether confined in an institution operated by the Department or on parole." App. 370.[1] Among the defendants in the action are petitioners in this case: the individual members of the California Adult Authority, the Administrative Officer of the California Adult Authority, and the Director of Corrections of the State of California. Plaintiffs' complaint alleges substantial constitutional violations in the manner in which the California Adult Authority carries out its function of determining the length and conditions of punishment for convicted criminal offenders.

In the course of discovery, plaintiffs submitted requests for the production of a number of documents pursuant to Fed. Rule Civ. Proc. 34. Petitioners' subsequent two petitions for writs of mandamus were concerned with two classes of documents that were part of these requests. The first class, part of a series of requests first made in June 1973, and which will be referred to here as the "Adult Authority files," is generally composed of the personnel files of all members and employees of the Adult Authority, all Adult Author-

[1] The seven prisoners and the class they represent will be referred to here as "plaintiffs."

ity documents relating to its past, present, or future operation, and all memoranda written by the Chairman of the Adult Authority within the preceding five years.[2] The second class of documents with which we are concerned was first requested by plaintiffs in November 1973,

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[2] The documents were specifically described in plaintiffs' requests numbered 7, 14, 15, 18, 20, 21, and 22:

"7. All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority."

"14. Each report submitted by any member, hearing representative, Executive Officer, or any other employee or official of the Adult Authority . . . ."

"15. All written statements written or delivered by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years favoring, opposing, or in any way commenting upon bills or other legislation or legislative proposal pending in the U. S. House of Representatives, the Senate of the United States, or the California Legislature."

"18. All written proposals for any change whatsoever in the organization or operation of, qualifications for, or substantive criteria and procedures to be employed by the Adult Authority . . . ."

"20. All memoranda written by the Chairman of the Adult Authority during the past 5 years, no matter to whom sent, including without limitation memoranda sent to other government organizations, agencies or officials, or to other members, hearing representatives, officials or employees of the Adult Authority."

"21. All documents in effect on November 15, 1972 which pertain to any Policy Statement or Resolution issued by the Adult Authority, including without limitation any file maintained on any Resolution or Policy Statement and all such documents executed or issued subsequent to that date."

"22. All documents, however formal or informal, issued during the past calendar year, which concern the Adult Authority's adoption of new policies, procedures, criteria, and the like, to be followed by members, hearing representatives, officials and employees . . . ." App. 52–56.

and will be referred to here as the "prisoners' files." Plaintiffs requested the opportunity to examine the files of every twentieth inmate at each California Department of Corrections institution, App. 234; the class of documents, therefore, is composed of the correctional files of a sample of the prisoners in the custody of the California Department of Corrections.

When presented with the request for the Adult Authority files, petitioners objected, claiming that the files were irrelevant, confidential, and privileged, and suggesting that they should not be required to turn over the files to plaintiffs without prior *in camera* review by the District Court to evaluate the claims of privilege. Plaintiffs moved, pursuant to Fed. Rule Civ. Proc. 37, for an order compelling discovery. App. 76. The District Court referred the matter to a Magistrate for findings and recommendations, and the Magistrate recommended that the District Court order production of the Adult Authority files without undertaking an *in camera* inspection of the files. The District Court accepted the Magistrate's recommendations and ordered the production of the documents. Seeking to limit distribution of the personnel files of the Adult Authority members and their employees, however, the District Court issued a protective order limiting the number of people associated with the plaintiffs who could examine those documents:

> "[N]o personnel file of any member of the Adult Authority, hearing representative or executive officer, nor any copy of any of its contents, shall be shown to any person except counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action." Pet. for Cert. xvi.

Dissatisfied with the District Court's ruling, petitioners filed a petition for a writ of mandamus under 28 U. S. C. § 1651 (a),[3] requesting the Court of Appeals for the Ninth Circuit to vacate the District Court's order granting plaintiffs' motion to compel discovery. The Court of Appeals denied the petition in an opinion filed on January 17, 1975. 511 F. 2d 192. It concluded first that since "the question of relevancy 'is to be more loosely construed at the discovery stage than at the trial,' 8 Wright & Miller, Federal Practice and Procedure, § 2008 at 41 (1970)," issuance of the writ on the grounds of the asserted irrelevance of the documents in question was inappropriate. *Id.*, at 196. According to the Court of Appeals, discovery of the documents was part of "a proper line of attack" in the underlying lawsuit. *Ibid.* The court went on to observe that petitioners had no absolute privilege that would allow them to avoid production of the documents at issue. The court did recognize, however, the existence of a qualified common-law governmental privilege "encompassing and referred to sometimes as the official or state secret privilege," *id.*, at 198, that could conceivably cover the requested documents. But relying on this Court's decision in *United States* v. *Reynolds*, 345 U. S. 1 (1953), the Court of Appeals indicated that because the assertions of privilege were not personally made by high-level officials of the California Adult Authority and because the assertions of privilege were lacking in what it saw to be the requisite specificity, issuance of the writ on grounds of privilege was inappropriate:

"Neither the Chairman of the [Adult] Authority

[3] Title 28 U. S. C. § 1651 (a) provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

nor the Director of Corrections nor any official of these agencies asserted, in person or writing, any privilege in the district court.

"The claiming official must ' "have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced" ' [*United States* v. *Reynolds,* 345 U. S., at 8 n. 20, quoting from *Duncan* v. *Cammell, Laird & Co.,* [1942] A. C. 624, 638,] and state with specificity the rationale of the claimed privilege. . . .

"In [this] suit, petitioners' counsel merely raised a blanket objection covering any and all documents in request numbers 7, 14, 15, 18, 20, 21 and 22. Formally claiming a privilege should involve specifying which documents or class of documents are privileged and for what reasons, especially where the nature of the requested documents does not reveal an obviously privileged matter. . . .

"In sum, the petition fails to show such an [*sic*] usurpation by the district court that warrants the extraordinary remedy of writ of mandamus." 511 F. 2d, at 198–199.

A similar course was followed with regard to the requests for the prisoners' files. When petitioners, asserting grounds of privilege, objected to the requests, plaintiffs filed a motion to compel production which the District Court referred for findings and recommendations to a Magistrate. The Magistrate recommended that petitioners be required to produce up to 200 prisoner files subject to a protective order "that would restrict examination and inspection of inmate files to attorneys for plaintiffs and for their use only in connection with this lawsuit." Pet. for Cert. xl. The District Court accepted the Magistrate's recommendation, but added to the rec-

ommended protective order a requirement that no prisoner's file be turned over for examination without the inmate's consent. *Id.*, at xxxi, xxxiii. Petitioners then filed a petition for mandamus which the Court of Appeals denied by order and without opinion on December 18, 1974. *Id.*, at xxiii.

Petitioners sought review in this Court of the denial of both petitions.[4] We granted certiorari.[5] 421 U. S. 987 (1975).

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[4] While it has not yet come to trial, there have been additional developments in the underlying case during the pendency of the instant action before this Court. Since none of these developments are relevant to the resolution of the issue before us, we simply summarize them.

Subsequent to the filing of the petition for certiorari in the instant case, plaintiffs filed a second amended complaint in the underlying action in which they added allegations which led petitioners in turn to request the appointment of a three-judge District Court to hear the case. See 28 U. S. C. § 2281. The single judge then hearing the case certified it to the Chief Judge of the Court of Appeals for the Ninth Circuit as one appearing to require the convening of a three-judge court. The Chief Judge appointed the three members of the court on October 28, 1975, several days before oral argument was held in the instant case. But soon thereafter plaintiffs amended their complaint once again. This subsequent amendment made the convening of a three-judge court appear unnecessary and the three-judge court dissolved itself, remanding the entire case to the single judge originally assigned to the case. Thus, as the matter now stands, the underlying action is being heard by a single-judge District Court.

[5] Subsequent to our grant of certiorari but before oral argument, plaintiffs represented to this Court that they "no longer seek any of the documents which are the subject of this appeal, because the trial of [the underlying] case in District Court will be completed before this Court is able to decide [the] issues before it." Memorandum of Respondents Concerning Mootness of Pending Matter 1–2. They therefore suggested that we hold this case moot. Plaintiffs never advised the District Court that they did not want the documents.

We deferred decision on the suggestion of mootness until after

II

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will* v. *United States*, 389 U. S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382–385 (1953); *Ex parte Fahey*, 332 U. S. 258, 259 (1947). As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will* v. *United States*, *supra*, at 95, quoting *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," *Will* v. *United States*, *supra*, at 95, the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Ibid.*

Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case "have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. *Bankers Life & Cas. Co.* v. *Holland*, *supra*, at 384–385,

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oral argument. However, at oral argument counsel for plaintiffs stated that, because the trial date for the underlying action had been substantially delayed, they had changed their minds and did indeed want the documents. Tr. of Oral Arg. 38, 40–41. While no papers were filed here formally withdrawing the suggestion of mootness, plaintiffs' representations at oral argument, combined with the fact that the trial of the underlying action has not yet taken place, leave us with no indication that this case is moot.

quoting *Ex parte Fahey, supra,* at 260. More importantly, particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule "appellate review should be postponed . . . until after final judgment has been rendered by the trial court." *Will* v. *United States, supra,* at 96; *Parr* v. *United States,* 351 U. S. 513, 520–521 (1956).[6] A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

As a means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, *Roche* v. *Evaporated Milk Assn., supra,* at 26, and that he satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co.* v. *Holland, supra,* at 384, quoting *United States* v. *Duell,* 172 U. S. 576, 582 (1899); *Will* v. *United States, supra,* at 96. Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed. *Schlagenhauf* v. *Holder,* 379 U. S. 104, 112 n. 8 (1964); *Parr* v. *United States, supra,* at 520. See also *Technitrol, Inc.* v. *McManus,* 405 F. 2d 84 (CA8 1968), cert. denied, 394 U. S. 997 (1969); *Pacific Car & Foundry Co.* v. *Pence,* 403 F. 2d 949 (CA9 1968).

[6] The use of extraordinary writs aside, it is only in narrowly defined circumstances, see 28 U. S. C. § 1292, that the appellate jurisdiction of the courts of appeals extends to interlocutory orders.

When looked at in the framework of these factors, it would appear that the actions of the Court of Appeals in this case should be affirmed. What petitioners are seeking here is not a declaration that the documents in question are absolutely privileged and that plaintiffs can never have access to any of them. On the contrary, petitioners request only that "production of the confidential documents not be compelled without a prior informed determination by the district court that plaintiffs' need for them in the action below outweighs their confidentiality." Brief for Petitioners 77–78. Petitioners ask in essence only that the District Court review the challenged documents *in camera* before passing on whether each one individually should or should not be disclosed. But the Court of Appeals' opinion dealing with the Adult Authority files did not foreclose the possible necessity of such *in camera* review. Its denial of the writ was based largely on the grounds that the governmental privilege had not been asserted personally by anyone eligible to assert it, and that it had not been asserted with the requisite specificity. The court apparently left open the opportunity for petitioners to return to the District Court, assert the privilege more specifically and through responsible officials, and then have their request for an *in camera* review of the materials by the District Court reconsidered in a different light:

> "Since there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek *in camera* inspection, at the time the documents are discovered in the district court." 511 F. 2d, at 198–199.

Petitioners contend that by denying the petition for mandamus the Court of Appeals has afforded them no remedy at all. To the contrary, we read the above-

quoted language of the opinion as providing petitioners an avenue far short of mandamus to achieve precisely the relief they seek.

To the extent that the opinion below might be regarded as ambiguous, we are fortified in our reading of it by a recognition of the serious consequences which could flow from an unwarranted failure to grant petitioners the opportunity to have the documents reviewed by the trial judge *in camera* before being compelled to turn them over. Petitioners' claims of privilege rest in large part on the notion that turning over the requested documents would result in substantial injury to the State's prison-parole system by unnecessarily chilling the free and uninhibited exchange of ideas between staff members within the system, by causing the unwarranted disclosure and consequent drying up of confidential sources,[7] and in general by unjustifiably compromising the confidentiality of the system's records and personnel files.[8] In light of the potential seriousness of these considerations and in light of the fact that the weight to be accorded them will inevitably vary with the nature of the specific documents in question, it would seem that an *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck.[9] Indeed, this Court has

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[7] See *Metros* v. *United States District Court for Dist. of Colo.*, 441 F. 2d 313 (CA10 1971).

[8] See *United States Board of Parole* v. *Merhige*, 487 F. 2d 25 (CA4 1973), cert. denied, 417 U. S. 918 (1974).

[9] Petitioners also assert, citing *Ford Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459 (1945), and *Edelman* v. *Jordan*, 415 U. S. 651 (1974), that discovery of material which is actually the property of the State or its agencies is limited by the Eleventh Amendment. In view of our resolution of this case and the fact that petitioners did

long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege. *E. g., United States* v. *Nixon*, 418 U. S. 683, 706 (1974); *United States* v. *Reynolds*, 345 U. S. 1 (1953).

Insofar as discovery of the prisoners' files is concerned, it is true that the Court of Appeals' order denying the petition for a writ of mandamus with regard to those files was issued without any statement of reasons for the denial. However, there is no reason to think that by its order the Court of Appeals meant to foreclose petitioners from following precisely the same avenue with regard to the prisoners' files as it gave them the opportunity to follow with regard to the Adult Authority files.

We are thus confident that the Court of Appeals did in fact intend to afford the petitioners the opportunity to apply for and, upon proper application, receive *in camera* review. Accordingly the orders of the Court of Appeals are affirmed.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

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not raise this issue either in the discovery proceedings in the District Court or in their petition for mandamus to the Court of Appeals we need not reach this issue.

Syllabus

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MOBIL OIL CORP., MARINE TRANSPORTATION DEPARTMENT, GULF-EAST COAST OPERATIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–1254. Argued March 29, 1976—Decided June 14, 1976

Section 8 (a)(3) of the National Labor Relations Act permits union- or agency-shop agreements between employers and unions, but § 14 (b) authorizes States to exempt themselves from § 8 (a)(3) and to enact "right-to-work" laws prohibiting union or agency shops. About two years after petitioner unions and respondent employer had entered into an agency-shop agreement covering seamen employed on respondent's oil tankers, respondent brought suit claiming that the agreement was invalid and unenforceable because it violated Texas' right-to-work laws. Since, *inter alia*, all final decisions for hiring the seamen are made in Texas, the majority of the then employed seamen reside in Texas, and respondent's personnel records are maintained and payroll checks are written there, the District Court held that Texas had an "intimate concern" with the agreement, notwithstanding that the seamen spend the vast majority of their working hours away from Texas on the high seas, and that therefore Texas' right-to-work laws were applicable under § 14 (b) and rendered the agreement void and unenforceable. The Court of Appeals affirmed, stressing that Texas was the place of hiring. *Held:*

1. It is the employees' predominant job situs rather than a generalized weighing of factors or the place of hiring that triggers operation of § 14 (b), and under § 14 (b) right-to-work laws cannot void agreements permitted by § 8 (a)(3) when the situs at which all the employees covered by the agreement perform most of their work is located outside of a State having such laws. Pp. 412–419.

(a) Insofar as § 8 (a)(3) deals with union- and agency-shop agreements, it focuses both in effect and purpose on *post*-hiring conditions, conditions that have a major impact on the job situs. Pp. 414–416.

(b) Similarly, § 14 (b)'s primary concern is with state regulation of the *post*-hiring employer-employee-union relationship, the center of which is the job situs, *i. e.*, the place where the work that is the very *raison d'être* of the relationship is performed; and because of this close relationship between § 14 (b) and job situs, § 14 (b) does not allow enforcement of right-to-work laws with regard to an employment relationship whose principal job situs is outside of a State having such laws. Pp. 416–418.

(c) Under the job situs test, as opposed to a place of hiring test, the possibility of patently anomalous extraterritorial applications of any given State's right-to-work laws will be minimized and parties entering a collective-bargaining agreement will easily be able to determine in virtually all situations whether a union- or agency-shop provision is valid. Pp. 418–419.

2. Under the job situs test Texas' right-to-work laws cannot govern the validity of the agency-shop agreement in question, because most of the employees' work is done on the high seas, outside the territorial bounds of Texas. It is immaterial that Texas may have more contacts than any other State with the employment relationship involved, since there is no reason to conclude under § 14 (b) that in every employment situation *some* State's law with respect to union-security agreements must apply, and it is fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that hence no State's right-to-work laws can apply. Pp. 420–421.

504 F. 2d 272, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring statement, *post*, p. 421. BURGER, C. J., concurred in the judgment. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 421. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 422.

Laurence Gold argued the cause for petitioners. With him on the briefs were *John Tadlock*, *J. Albert Woll*, *Howard Schulman*, and *Chris Dixie*.

James W. Hambright argued the cause for respond-

ent. With him on the brief were *John G. Tucker, Theophil C. Kammholz,* and *Warren H. Greene, Jr.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 8 (a)(3) of the National Labor Relations Act, 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 158 (a)(3), permits employers as a matter of federal law to enter into agreements with unions to establish union or agency shops.[1] Section 14 (b) of the Act, 61 Stat. 151, 29 U. S. C. § 164 (b), however, allows individual States and Territories to exempt themselves from § 8 (a)(3) and to enact so-called "right-to-work" laws prohibiting union or agency shops.[2] We must de-

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**Solicitor General Bork, John S. Irving, Norton J. Come,* and *Linda Sher* filed briefs for the United States as *amicus curiae* urging reversal.

[1] A "union shop" agreement provides that no one will be employed who does not join the union within a short time after being hired. An "agency shop" agreement generally provides that while employees do not have to join the union, they are required—usually after 30 days—to pay the union a sum equal to the union initiation fee and are obligated as well to make periodic payments to the union equal to the union dues. See *NLRB* v. *General Motors Corp.*, 373 U. S. 734 (1963). The "union shop" and "agency shop" varieties of "union security" agreements are to be distinguished from the "closed shop" agreement, barred by § 8 (a)(3), which provides that the employer will hire no one who is not a member of the union at the time of hiring.

[2] Section 14 (b) provides in full:

"Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

It is settled that § 14 (b) encompasses the agency-shop as well as the union-shop agreement. *Retail Clerks* v. *Schermerhorn,* 373 U. S. 746 (1963).

cide whether, under § 14 (b), Texas' right-to-work laws can void an agency-shop agreement covering unlicensed seamen who, while hired in Texas and having a number of other contacts with the State, spend the vast majority of their working hours on the high seas.

I

Petitioners (hereinafter Union) [3] represent the unlicensed seamen who work on respondent employer's oil tankers. In November 1969 the Union and respondent entered into a collective-bargaining agreement which provided for an agency shop: "For the duration of the Agreement all employees hired shall, as a condition of employment, become members of the Union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date." App. 281. Almost two years after entering into the agreement, respondent filed suit in the United States District Court for the Eastern District of Texas under § 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. § 185, claiming that the agency-shop provision was invalid and unenforceable because it violated Texas' right-to-work laws.[4]

Uncontested evidence was presented at trial concerning the relevant locations of various aspects of the rela-

[3] There are two petitioners in this case, Oil, Chemical and Atomic Workers International Union, AFL–CIO, and its Local 8–801. Both are parties to the collective-bargaining agreement with respondent.

[4] Texas' right-to-work laws prohibit, *inter alia*, the denial of employment to anyone because of a failure to pay "any fee, assessment, or sum of money whatsoever" to a union. Tex. Rev. Civ. Stat. Ann., Art. 5154a, § 8a (1971). The parties are agreed that the law encompasses agency-shop provisions. See Op. Atty. Gen. Tex. No. WW–1018 (1961).

tionship between the Union, the respondent, and the seamen. Because this evidence bears heavily on the contentions of the parties, we shall summarize it in some detail. Respondent is a division of Mobil Oil Corp., a New York corporation, and operates a fleet of eight oceangoing tankers which transport respondent's petroleum products from Texas to Atlantic coast ports. Respondent is headquartered in Beaumont, Tex., and maintains its personnel records there. Sixty percent of the applications to be unlicensed seamen on respondent's ships are made in Beaumont and 40% in New York. The final hiring decisions are made in Beaumont. Of the 289 unlicensed seamen who are employed to man the tankers, 123 maintain residence in Texas, and 60 in New York.[5] One hundred and fifty-two of the seamen list Beaumont as their shipping port—a designation that determines travel allowances to and from a seaman's residence—and the remainder list either New York or Providence, R. I. Seamen can elect to be paid their wages aboard ship, to have their paychecks sent from the Beaumont office to designated recipients, or to use a combination of these two schemes. The collective-bargaining agreement whose agency-shop provision is at issue here was negotiated and executed in New York. It was re-executed in Texas.

A typical trip by one of respondent's tankers from Beaumont, the Texas port, to Providence or New York, the Atlantic ports, takes from 4½ to 5 days. Loading and unloading in port takes from 18 to 30 hours. No more than 10% to 20% of the seamen's work time is spent within the territorial bounds of Texas.

Based on the above evidence, fully reflected in its

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[5] The residences of the remainder are spread over 20 other States.

findings of fact, the District Court concluded that "[t]he acts performed in the State of Texas in the administration and performance of the collective bargaining agreement are such that the State of Texas is intimately concerned with the collective bargaining agreement and with the employees working thereunder." App. 29. Relying on this "intimate concern," the court held that the Texas right-to-work laws were applicable under § 14 (b) and that the agency-shop provision was therefore void and unenforceable.

A three-member division of the United States Court of Appeals for the Fifth Circuit, one judge dissenting, reversed. 483 F. 2d 603 (1973). The court concluded that the Texas right-to-work laws could not apply since the employees' principal job situs is not in Texas but rather is on the high seas. On rehearing en banc the full court, over the dissent of six of its members, vacated the division opinion and affirmed the judgment of the District Court. 504 F. 2d 272 (1974). The court identified and analyzed the interests that Texas has in the employment relationship at issue, placing special stress on the fact that all final hiring decisions take place in Texas. It held that "the federal labor legislation, the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right to work law to this employment relationship warrant application of the Texas law and, consequently, invalidation of the agency shop provision." *Id.*, at 275. We granted certiorari, 423 U. S. 820 (1975), and we now reverse.

II

All parties are agreed that the central inquiry in this case is whether § 14 (b) permits the application of Texas' right-to-work laws to the agency-shop provision in the collective-bargaining agreement between the

Union and respondent.[6] Only if it is to be so read is the agency-shop provision unenforceable.[7] The parties are similarly agreed that a State can apply its right-to-work laws only with respect to employment relationships with which the State has adequate contact. The crux of the differences between the parties concerns whether the contacts between Texas and the employment relationship in this case are sufficient to come under § 14 (b).

The Union, as well as the United States as *amicus curiae,* argues that the nature of the concerns at which § 14 (b) is directed mandates that job situs be the controlling factor in determining the applicability of § 14 (b), and that since in this case the employees' principal job situs is on the high seas—outside the territorial bounds of the State—the agency-shop provision at issue is valid. Respondent contends that "[t]he sufficiency of a state's interest in applying its law is to be determined by looking to the whole employment relationship." Brief for Respondent 15. Giving weight to all the contacts between Texas and the employment relationship, see *supra,* at 410–411, respondent concludes that Texas can validly apply its right-to-work laws under

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[6] The Union does not claim that Texas' contacts are so minimal as to make the application of the Texas laws in any way unconstitutional. Nor does respondent argue that Congress lacked the power, if it wished, to prohibit state right-to-work laws altogether.

[7] There is nothing in either § 14 (b)'s language or legislative history to suggest that there may be applications of right-to-work laws which are not encompassed under § 14 (b) but which are nonetheless permissible. As we recognized in *Retail Clerks* v. *Schermerhorn,* 375 U. S., at 103, it is "§ 14 (b) [which] gives the States power to outlaw even a union-security agreement that passes muster by federal standards." Cf. *Kentucky State AFL–CIO* v. *Puckett,* 391 S. W. 2d 360 (Ky. 1965); *Grimes & Hauer, Inc.* v. *Pollock,* 163 Ohio St. 372, 127 N. E. 2d 203 (1955).

§ 14 (b). A third approach, the one adopted by the dissenting opinion in this case, is that the location of the hiring process should be determinative of the applicability of a State's right-to-work laws. Under this test, also, Texas' contacts in this case would be sufficient to apply its laws.

In light of what we understand Congress' concerns in both § 8 (a)(3) and § 14 (b) to have been, we conclude that it is the employees' predominant job situs rather than a generalized weighing of factors or the place of hiring that triggers the operation of § 14 (b). We hold that under § 14 (b), right-to-work laws cannot void agreements permitted by § 8 (a)(3) when the situs at which all the employees covered by the agreement perform most of their work is located outside of a State having such laws.

Under § 8 (3) of the Wagner Act, enacted in 1935, closed shops, union shops, and agency shops were all permitted. But in 1947, in § 8 (a)(3), as added by the Taft-Hartley Act, Congress reacted to widespread abuses of closed-shop agreements by banning such arrangements.[8] Union and agency shops were still permitted, however, by § 8 (a)(3). That provision makes employment discrimination in favor of or against labor unions an unfair labor practice but contains the following proviso which we have held to apply to agency shops as well as union shops, *NLRB* v. *General Motors Corp.*, 373 U. S. 734 (1963):

> "*Provided,* That nothing in this subchapter or in any other statute of the United States, shall preclude an employer from making an agreement with

[8] See *NLRB* v. *General Motors Corp.*, 373 U. S. 734 (1963); S. Rep. No. 105, 80th Cong., 1st Sess., 6, 1 Legislative History of the Labor Management Relations Act, 1947 (hereinafter Leg. Hist.), p. 412 (1948).

> a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."

While permitting agency- and union-shop agreements, however, Congress provided certain safeguards for employees who were subject to such agreements. Thus a second proviso to § 8 (a)(3) warns:

> "[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Like its decision to ban closed-shop agreements, Congress' decision in § 8 (a)(3) to provide these safeguards reflects a concern with compulsory unionism. But, in stark contrast to closed-shop agreements, these safeguards and the agency- or union-shop agreements to which they apply are not focused on the hiring process. Rather, they are directed at conditions that must be fulfilled by an employee only *after* he is already hired, at least 30 days after he is already working at the jobsite.[9] Moreover, quite apart from the safeguards that it

[9] In explaining the distinction that § 8 (a)(3) draws between closed shops on the one hand and lesser union-security agreements on the other, Senator Taft noted:

"The great difference is that in the first instance a man can get a job without joining the union or asking favors of the union, and

provided, Congress' decision to allow union-security agreements at all reflects its concern that, at least as a matter of federal law, the parties to a collective-bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them. Again, the focus of this concern is *not* the hiring process, but rather the benefits to be derived from union representation during the period of employment—while the employee is on the job. Thus, the Senate Committee Report on what became the Taft-Hartley Act observed that § 8 (a)(3) gives "employers and unions who feel that [union-security] agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." S. Rep. No. 105, 80th Cong., 1st Sess., 7 (1947), 1 Leg. Hist. 413. "Congress recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.' S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. L. M. R. A. 412." *NLRB* v. *General Motors Corp., supra,* at 740–741.

In short, insofar as it deals with union-security agreements less onerous than the closed-shop agreement, § 8 (a)(3) focuses in both effect and purpose on *post*-hiring conditions, conditions which have a major impact on the job situs.

While § 8 (a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law, § 14 (b) reflects Congress' decision that any

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once he has the job he can continue in it for 30 days, and during that time the employer will have an opportunity to ascertain whether he is a capable employee. The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the job." 93 Cong. Rec. 4886 (1947), 2 Leg. Hist. 1422.

State or Territory that wishes to may exempt itself from that policy. Section 14 (b) allows a State or Territory to ban agreements "requiring membership in a labor organization as a condition of employment." [10] We have recognized that with respect to those state laws which § 14 (b) permits to be exempted from § 8 (a)(3)'s national policy "[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . . ." *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963). The question here, of course, is whether Texas' contacts with this employment relationship are adequate to call into play § 14 (b)'s mandated deference to state law.

Section 14 (b) simply mirrors that part of § 8 (a)(3) which focuses on *post*-hiring conditions of employment. As its language reflects, § 14 (b) was designed to make clear that § 8 (a)(3) left the States free to pursue "their own more restrictive policies in the matter of union-security agreements." *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 314 (1949). Since § 8 (a)(3) already prohibits the closed shop, the more restrictive policies that § 14 (b) allows the States to enact relate not to the hiring process but rather to conditions that would come into effect only *after* an individual is hired. It is evident, then, that § 14 (b)'s primary concern is with state regulation of the *post*-hiring employer-employee-union relationship. And the center of the post-hiring relationship is the job situs, the place where the work that is the very *raison d'être* of the relationship is performed.

The centrality of job situs to Congress' concern in § 14 (b) is also suggested by the House Committee Report on the bill that contained the substance of what was

[10] See n. 2, *supra*.

finally enacted as § 14 (b). That report reflects the House's intent that agreements providing for agency or union shops would be valid "only if they are valid under the laws of any State in which they are to be performed." H. R. Rep. No. 245, 80th Cong., 1st Sess., 34 (1947), 1 Leg. Hist. 325. Where an agreement is "performed" may be open to some debate, but we think the most reasonable reading of the phrase is that union-security agreements are "performed" on the job situs. Thus, the import of the House Report is that the committee viewed what became § 14 (b) as allowing a State to ban agreements calling for work to be performed within the State. While the Taft-Hartley Act as finally enacted does not contain the precise wording of the House bill, there is no indication that any language changes were designed to alter this focus on the place of performance.

Whether taken separately or together, the place of hiring and the other factors on which respondent relies—the employees' place of residence, the locale of personnel records, the place at which payroll checks are written, etc.—are not nearly as central to the concerns of § 14 (b) as the employees' job situs. And, because of this close relationship between § 14 (b) and job situs we conclude that § 14 (b) does not allow enforcement of right-to-work laws with regard to an employment relationship whose principal job situs is outside of a State having such laws.

Two practical considerations bolster our conclusion that the employees' predominant job situs should determine the applicability of a State's right-to-work laws under § 14 (b). First, the use of a job situs test will minimize the possibility of patently anomalous extraterritorial applications of any given State's right-to-work laws. Use of a job situs test will insure that the laws of a State with a continuing and current relationship

with the employees in question will govern the validity *vel non* of any union-shop or agency-shop provision. On the other hand, if place of hiring were to be the determinative factor, Texas, for instance, could apply its right-to-work laws to employees who work solely in Connecticut simply because the relevant hiring decisions were made—perhaps many years ago—in Texas. We cannot believe that it was Congress' purpose in passing § 14 (b) to sanction such a result.

A test such as the one adopted by the Court of Appeals that evaluates all of a jurisdiction's employment relationship contacts in order to determine the applicability of its right-to-work laws under § 14 (b) might not result in irrational extraterritorial applications. But such a test does suffer the disadvantages of being both less predictable and more difficult of application than a job situs test. Under a job situs test, parties entering a collective-bargaining agreement will easily be able to determine in virtually all situations whether a union- or agency-shop provision is valid. By contrast, bargaining parties would often be left in a state of considerable uncertainty if they were forced to identify and evaluate all the relevant contacts of a jurisdiction in order to determine the potential validity of a proposed union-security provision. The unpredictability that such a test would inject into the bargaining relationship, as well as the burdens of litigation that would result from it, make us unwilling to impute to Congress any intent to adopt such a test.[11]

[11] Our use of a job situs test is consistent with the National Labor Relation Board's application of § 14 (b) under the statutory provision, 29 U. S. C. § 159 (e) (1) (1946 ed., Supp. I), requiring the Board in certain circumstances to conduct employee elections to authorize the negotiation of union-security agreements. In determining the employees who were eligible to vote for and be covered by a union-security agreement, the Board in both *Giant Food Shopping Center, Inc.*, 77 N. L. R. B. 791 (1948), and *Western Electric*

III

Having concluded that predominant job situs is the controlling factor in determining whether, under § 14 (b), a State can apply its right-to-work laws to a given employment relationship, the disposition of this case is clear. Because most of the employees' work is done on the high seas, outside the territorial bounds of the State of Texas, Texas' right-to-work laws cannot govern the validity of the agency-shop provision at issue here. It is immaterial that Texas may have more contacts than any other State with the employment relationship in this case, since there is no reason to conclude under § 14 (b) that in every employment situation *some* State or Territory's law with respect to union-security agreements must be applicable.[12] Federal policy favors permitting such agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws. It is therefore fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State

Co., 84 N. L. R. B. 1019 (1949), indicated that the laws of one State prohibiting such agreements could not apply to employees whose job situs was in another State or Territory.

[12] The Court of Appeals argued that to refuse to "allow Texas to apply its law here would create the bizarre consequence of exempting the maritime industry from the operation of section 14 (b)." 504 F. 2d 272, 280–281 (1974). It further observed, pointing to the 1951 amendment to the Railway Labor Act, 45 U. S. C. § 152 Eleventh, that "when Congress has decided to supersede section 14 (b) and state right to work laws, it has done so expressly." 504 F. 2d, at 281. In applying a job situs test to this case, we create no "exemption" from § 14 (b) for the maritime industry. Under this test, a State can still apply its right-to-work laws to maritime workers, such as longshoremen, whose job situs is within the State. Moreover, the Railway Labor Act amendments are simply irrelevant to this case. The issue that we decide here is not whether § 14 (b) has been superseded, but rather whether it applies in the first instance.

has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply.

Accordingly, the judgment of the Court of Appeals is reversed.

So ordered.

MR. CHIEF JUSTICE BURGER concurs in the judgment.

MR. JUSTICE STEVENS, concurring.

As I read § 14 (b), the prepositional phrase "in any State or Territory" modifies the immediately preceding noun "employment." This reading is consistent with the analysis in the Court's opinion, which I join except for its suggestion that federal policy favors permitting union-shop and agency-shop agreements.

MR. JUSTICE POWELL, concurring in the judgment.

Although I concur in the judgment of the Court, I do not think it necessary to determine in this case whether a "job situs" test is appropriate or required generally. The only issue before the Court is whether federal or state law should apply to the employment contracts of maritime workers whose job situs is the high seas and who thereby enjoy a special status. As noted by Judge Ainsworth, writing for the six dissenting members of the Court of Appeals:

> "[S]eamen have traditionally maintained an exceptional status in regard to the regulation and control of their employment, and . . . section 14 (b) cannot reasonably be construed to remove them from that category. Seamen, particularly the type of blue-water seamen involved here, as wards of admiralty have been accorded a special status and protection under federal maritime law unknown to state law in the domain of the master-servant relationship. Unlike the land-based worker, the seaman's employ-

ment and all of the rights and restrictions flowing therefrom, are determined by federal statutory and admiralty law, not state law. . . .

. . . . . .

". . . The consistent and traditional control by federal law of every phase of maritime employment relationships and contracts refutes the proposition that [respondent's] contacts with Texas justify injecting state law into federal maritime affairs." 504 F. 2d 272, 284–286 (CA5 1974) (footnotes omitted).

I join in reversing the judgment of the Court of Appeals, as I do not believe § 14 (b) can be construed reasonably to apply to these seamen.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The respondent, Mobil Oil Corp., is a New York corporation with its home office in New York City. The Gulf-East Coast Operations Division of Mobil's Marine Transportation Department, located in Beaumont, Tex., operates eight oceangoing American-flag tankers. These ships transport petroleum products between Texas and various ports on the Atlantic coast. Every month each tanker normally makes two round-trip voyages. On the average voyage a ship is at sea for four or five days and spends approximately 18 to 30 hours in port to load or unload its cargo.

The petitioner Maritime Local 8–801 of the Oil, Chemical and Atomic Workers International Union represents the 289 blue-water seamen who man the tankers. When this lawsuit began, 123 of these 289 employees claimed Texas as their residence,[1] and 152 of them had requested

[1] Sixty of the employees listed New York as their residence, 21 New Jersey, 16 Florida, 13 Louisiana, 10 Maine, and 10 Rhode Island. The remainder resided in 16 other States.

the company to list Beaumont as their home port. Although 40% of the seamen had first applied for work in New York, the remainder had applied for the jobs in Texas, and the final hiring decision for all of them had been made in Beaumont. Texas has collected unemployment compensation insurance premiums for all of these employees, regardless of what State any of them might have designated as his home address or shipping port.

The seamen perform all of their duties aboard ship. They work for approximately 85 days and then receive 37 days of paid shore leave. Eighty to 90% of their work is performed on the high seas.

In 1969 Mobil and the Union concluded a collective-bargaining agreement in New York that covered these seagoing employees. Among other provisions, the agreement contained an agency-shop clause that required all the employees to become "members of the union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date." App. 281. In a challenge to this clause, Mobil brought the present suit under § 301 of the Labor Management Relations Act, 1947, 29 U. S. C. § 185, and under 28 U. S. C. § 2201, seeking a declaratory judgment that the clause is invalid because it violates the "right-to-work" laws of Texas.[2]

The District Court, agreeing with Mobil that Texas was more intimately involved with the employment relationship than any other State, held that Texas' right-to-work laws applied to the agreement. It accordingly declared the agency-shop provision invalid and unenforceable. A divided panel of the Court of Appeals for the Fifth Circuit initially reversed this judgment, 483 F. 2d 603 (1973), but on rehearing en banc, that court af-

[2] It is conceded that these state laws prohibit an agency-shop agreement of the kind here involved. See n. 4, *infra*.

firmed the judgment of the District Court. 504 F. 2d 272 (1974). The en banc appellate court analyzed all the relevant contacts that Texas has with the employees in question and concluded that "federal labor legislation, the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right to work law to this employment relationship warrant application of the Texas law and, consequently, invalidation of the agency shop provision." *Id.*, at 275.

I

Sections 8 (a)(3) and 14 (b) of the National Labor Relations Act, 29 U. S. C. §§ 158 (a)(3) and 164 (b), delineate the federal interest in union-security arrangements. The first proviso of Section 8 (a)(3)[3] says

[3] Section 8 (a)(3) reads in full:

"It shall be an unfair labor practice for an employer—

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has

that no law of the United States "shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day" of employment. The second proviso qualifies the first:

> "[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Together, these two provisions sanction a "union shop" agreement, which, although permitting employment of those who are not union members, requires employees to join the union (or pay dues in lieu of membership) 30 days after employment has begun. But they outlaw a "closed shop" agreement, which requires union membership as a precondition to both initial and continued employment. *NLRB* v. *General Motors Corp.*, 373 U. S. 734, 738–739 (1963).

These provisions modified § 8 (3) of the National Labor Relations Act, 49 Stat. 452, which permitted not only union shops, but closed shops as well. See *NLRB* v. *General Motors Corp., supra,* at 739–740; S. Rep.

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reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

No. 105, 80th Cong., 1st Sess., 6 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947). Section 8 (a)(3) was designed to curb the abuses of compulsory unionism, which "create[d] too great a barrier to free employment," S. Rep. No. 105, *supra*, at 6, but at the same time, to continue to afford unions a measure of security by enabling them to prevent "free riders." *Id.*, at 7. As the Court stated in the *General Motors* case, *supra*, at 740–741:

> "These additions [to § 8 (a)(3)] were intended to accomplish twin purposes. On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.'"

Section 8 (a)(3) thus accommodated the competing interests by eliminating the union hiring hall while assuring that "[a]s far as the federal law was concerned, all employees could be required to pay their way." 373 U. S., at 741; see S. Rep. No. 105, *supra*, at 6–7.

But Congress chose not to establish a uniform national rule permitting the union shop. States were to be left free to determine that security arrangements of any sort were against the public interest. *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 313–314 (1949). This was made clear in § 14 (b) of the National Labor Relations Act, as added by the Labor Management Relations Act, 29 U. S. C. § 164 (b), which states:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory

> in which such execution or application is prohibited by State or Territorial law."

Congress added this section to the Act "to forestall the inference that federal policy was to be exclusive." *Algoma Plywood Co., supra,* at 314. Section 14 (b) "was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements. . . . It was desired to 'make certain' that § 8 (a)(3) could not 'be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy.'" *Retail Clerks* v. *Schermerhorn,* 373 U. S. 746, 751 (1963), quoting H. R. Conf. Rep. No. 510, *supra,* at 60.

To summarize, §§ 8 (a)(3) and 14 (b) together exhaust the federal interest in the types of union-security agreements employers and unions may make. The closed shop is absolutely prohibited. And any lesser security arrangement, though consistent with the federal interest, is sanctioned only if it harmonizes with state policy.

It is undisputed that Texas law forbids union-shop agreements.[4] The issue presented by this case, then, is whether this Texas law may extend to bar the security provision contained in the collective-bargaining agreement between the petitioners and the respondent. The petitioners contend that the applicability of state right-to-work laws depends upon where the work is to be performed. They conclude that because the employees in question perform 80% to 90% of their work on the high seas, the federal policy "favoring" union-shop provisions should prevail.[5] The Government as *amicus curiae,*

[4] In Opinion No. WW-1018 (1961), the Attorney General of Texas held that union-shop agreements violate Art. 5154a, § 8a, Art. 5207a, § 2, and Art. 5154g, § 1, Tex. Rev. Civ. Stat. Ann. (1971).

[5] It is not at all obvious that federal policy favors union-shop agreements. It is true that such agreements are legal in States that

agreeing with the petitioners, asserts that Texas does not have a substantial enough interest to apply its labor policies since little work is performed within its borders. The respondent, in turn, relying upon the decisions of the District Court and the Court of Appeals, claims that the place of hiring is the key to analyzing the choice-of-law problem.

The language of § 14 (b) provides no clear guidance for determining whose law should prevail in a multijurisdictional situation. Section 14 (b) does prescribe a threshold: In order to apply its right-to-work laws, a State must be the place of "execution" or "application" of the union-security agreement. "Execution" and "application" are, however, broadly inclusive nouns. It is hardly conceivable that a State would wish to enforce its right-to-work laws unless the collective-bargaining agreement was in some sense either executed or applied in the State. Yet clearly each of a number of States in a multistate situation could plausibly argue that it is the situs of "application" or "execution." The State

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have not passed legislation forbidding them, whereas Congress might have reversed the burden by making all union-security agreements illegal except in States that choose to permit them. Burdens in the law, however, are allocated for a variety of reasons, only one of which is to make more difficult the achievement of a disfavored result. Another, equally plausible explanation for the wording of § 14 (b) is that Congress might have determined that less disruption in the state lawmaking process would result if union-shop agreements were permitted absent state legislation. In 1947, when Congress was considering the Labor Management Relations Act, only 12 States barred the union shop. S. Rep. No. 105, 80th Cong., 1st Sess., 6 (1947). Had Congress placed the burden of legislating on States wishing to *legalize* the union shop, three-fourths of the States would have had to enact legislation. As § 14 (b) was in fact worded, no state legislation was required to preserve the status quo. In sum, there is simply no way of deducing from the construction of § 14 (b) whether, despite leaving the issue to the States, Congress preferred or disfavored the union shop.

of "execution," for example, could be considered to be either the State where the contract was signed or the State where the terms of the contract are to be carried out. "Application" could refer either to the hiring process or the performance of the work. In short, there is no intelligent way to infer from § 14 (b)'s expansive language which of a number of arguably relevant aspects of the employment relationship should be deemed the dispositive contact for deciding which State's law is to apply.

The specific legislative history of § 14 (b) is of no greater aid in resolving the dilemma.[6] Congress simply did not address the choice-of-law problems that would inevitably arise in multistate work force situations. We are, however, not entirely without signposts. When Congress legislated with respect to union-security agreements in 1947, it did not write on a clean slate, for few issues in American labor history had been as controverted as the moral legitimacy and, indeed, the legality, of union-security agreements. It is unnecessary for the purpose of this case to review the history of that long controversy.[7] It is sufficient only to realize that Con-

[6] The en banc opinion of the Court of Appeals relied upon language in the House Report that condemned the evils of the union hiring hall in the maritime industry to support the proposition that the place of hiring is the critical factor in determining the choice of law. 504 F. 2d 272, 277, and n. 10 (CA5 1974). As the context of the cited language makes clear, however, see S. Rep. No. 105, *supra*, at 6–7, Congress' concern over the hiring hall led it to outlaw the closed shop. Having forbidden agreements making union membership a precondition to employment, Congress exhausted the federal interest in the union hiring hall.

[7] See generally R. Morris, Government and Labor In Early America, 136–207 (1946); P. Sultan, Right-To-Work Laws: A Study in Conflict 12–30 (1958); J. Toner, The Closed Shop 1–92 (1942); Dempsey, The Right-To-Work Controversy, 16 Lab. L. J. 387 (1965); Warshal, "Right-to-Work," Pro and Con, 17 Lab. L. J. 131

gress did not resolve it, but instead left each individual State free to outlaw union-security agreements in the interest of a perceived policy of keeping industrial relations more individualistic, open, and free.

Although apparently no recorded legislative history exists to interpret the design of the Texas Legislature, the language of the statutes suggests that their principal purpose was, indeed, to democratize the hiring process. The Preamble of Public Policy contained in Art. 5154a, § 1, Tex. Rev. Civ. Stat. Ann. (1971), states in part:

> "Because of the activities of labor unions affecting the economic conditions of the country and the State, entering as they do into practically every business and industrial enterprise, it is the sense of the Legislature that such organizations affect the public interest and are charged with a public use. *The working man, unionist or non-unionist, must be protected. The right to work is the right to live.*" (Emphasis added.)

Article 5207a states in part:

> "Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.
>
> "Sec. 2. No person shall be denied employment on account of membership or nonmembership in a labor union."

Finally, Art. 5154g, § 1, states:

> "It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of mem-

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(1966); Simons, Some Reflections on Syndicalism, 52 J. Pol. Econ. 1 (1944).

> bership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion."

Each of these passages bespeaks an interest in a free hiring process and in preserving the freedom of the working man or woman to pursue and continue in employment, unhindered by coerced but unwanted union association.[8]

In *Lunsford* v. *City of Bryan*, 297 S. W. 2d 115, 117 (1957), the Supreme Court of Texas interpreted these statutes: "The intent seems obvious to protect employees in the exercise of the right of free choice of joining or not joining a union. The purpose of the statute is to afford equal opportunity to work to both classes of employees." This authoritative state judicial interpretation thus confirms what seems manifest from the language of the statutes: Texas' right-to-work laws are concerned with the process by which employees are hired and the conditions which, after their hiring, may burden their employment.

In the light of these purposes I agree with the District Court and the Court of Appeals that the laws of Texas govern the union-security agreement in this case. It is true that a number of States might legitimately assert an interest in the hiring process. The State where the employees reside, the State where the conditions of employment were negotiated, and the State where the hiring decision actually took place all have their claims. I believe, however, that the State where

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[8] For an analysis of the effect of the Texas right-to-work laws, see Meyers, Effects of "Right-To-Work" Laws: A Study of the Texas Act, 9 Ind. & Lab. Rel. Rev. 77, 84 (1955) (concluding that laws had had "little effect" on the rate of union organization in all but a few selected industries).

the hiring actually takes place is, so far as the issue now before us goes, the most relevant jurisdiction for choice-of-law purposes, and that State in this case is Texas.[9]

In the first place, it seems clear that the State where the hiring actually takes place is the State most deeply concerned with the conditions of hire. The policy of a State such as Texas, which favors unrestricted hiring, will be seriously undermined when union-security agreements control the hiring that takes place within its jurisdiction. Moreover, the State where the hiring actually occurs normally provides the bulk of the work force from which the employees are drawn. And while a rule designating the laws of the State where the bargaining agreement was negotiated would provide for ease of application, it would also encourage forum shopping by both unions and management seeking the sanction of state laws that would most favor their interests.

Against this analysis, both the Government, as *amicus*, and the petitioners contend that job situs should be the determining factor in applying right-to-work laws. The parties do not explain, however, what the relevance of job situs is to laws that concern themselves exclusively

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[9] The final hiring decision for all of the employees here involved was made in Beaumont, Tex. It could be argued that the interests of both Texas and New York, where a minority of the employees applied for their jobs (and which permits union shops), could be accommodated through an arrangement by which the union-security laws of each State were applied to those of the work force who had applied for work within each jurisdiction. See Comment, 88 Harv. L. Rev. 1620, 1629–1630 (1975). Such a solution, however, which would likely place members of the same crew under different regimes, could easily disrupt the management of labor relations and would create unjustifiable uncertainties in the law. Cf. *Dale System, Inc.* v. *Time, Inc.*, 116 F. Supp. 527 (Conn. 1953); A. Von Mehren & D. Trautman, The Law of Multistate Problems 395 (1965). I would hold, therefore, that a uniform rule must be applied to all employees who are governed by a single collective-bargaining agreement.

with the hiring process. Cf. A. Von Mehren & D. Trautman, The Law of Multistate Problems 76–79, 102–105 (1965). Indeed, the place where work is actually performed is probably the least relevant factor in the entire employment relationship for resolving conflicts over the legality of union-security agreements. It is undeniable, as the petitioners point out, that the job situs is where most of the day-to-day contact between employer and employees occurs. But right-to-work laws do not reflect a concern with job safety, or work rules, or hours of employment, or grievance procedures, or other similar conditions of employment with which the jurisdiction where the work actually takes place is legitimately concerned.[10]

[10] The Court suggests, *ante*, at 419, that adopting a choice-of-law rule that focuses upon the place of hiring might result in the extraterritorial application of a State's laws. This contention begs the question. It is true that some components of the employment relationship are found outside Texas. But this is inevitable in a multijurisdictional collective-bargaining agreement. Since the one activity—hiring—that is relevant to the Texas statutes does take place in Texas, not at sea, their application under the facts of this case does not give extraterritorial effect to Texas' laws.

The petitioners argue that if the place of hiring is dispositive for conflict-of-laws purposes, § 14 (b)'s strictures will be evaded, since companies will simply relocate in that minority of States that have enacted right-to-work laws. The answer to this contention turns upon what is meant by evasion. The rule I would adopt centers upon where the actual, not some fictional, hiring decision is made. Thus, a sham relocation in a right-to-work State would not be sufficient to engage that State's union-security rules if the actual hiring decisions continued to be made in a jurisdiction that permitted union-shop agreements.

If, on the other hand, evasion is used to characterize a genuine corporate relocation, including hiring, which is motivated by a quest for more favorable labor laws, then the short answer is that there is nothing illegitimate or devious about a company's moving to a new location to take advantage of lower prevailing wage rates, taxes, raw materials, or production costs, *or* to operate under more favorable laws.

A job situs test for the resolution of which State's union-security law applies is, therefore, so arbitrary in my view as to approach irrationality.

II

But even if I could agree with the petitioners that the jobsite is the critical factor in determining what law should control the legality of union-security agreements, I would still find the laws of Texas applicable in this case. Quite simply, the employees here involved clearly perform a larger share of their employment duties in Texas than in any other State.

By contrast, the petitioners perceive this case as presenting a vertical conflict between Texas law and "federal law." If the law of the jurisdiction where the work is performed controls, then, according to that perception, the "federal" rule *ipso facto* prevails, since 80% to 90% of the work is performed on the high seas.

The petitioners suggest alternative and somewhat inconsistent theories to justify the intrusion of "federal law" into this case. The first is that the high seas are, like the District of Columbia, a federal territory over which Congress exercises exclusive, pre-emptive jurisdiction.[11] This theory is untenable. Congress undoubtedly has power under the Admiralty Clause, Art. III, § 2, to

[11] It is worth noting that a conflict between the law of a federal Territory and that of a State is not a vertical conflict at all. A vertical conflict is characterized by the conflict between a superior and an inferior lawmaking authority, both of which may operate within the same territory. A state law legalizing the *closed* shop, for example, would conflict and have to give way to the federal law outlawing such arrangements. A horizontal conflict, on the other hand, exists when the laws of two or more equally competent lawmaking bodies, all of which have plenary jurisdiction within their respective territories, are in conflict. A conflict between the laws of two States would properly be characterized as horizontal, as would that between the laws of the District of Columbia and a State.

pre-empt the entire field of maritime law. *E. g., Panama R. Co.* v. *Johnson,* 264 U. S. 375, 386 (1924); *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 160 (1920); see G. Gilmore & C. Black, The Law of Admiralty 45–47 (1975); Currie, Federalism and the Admiralty: "The Devil's Own Mess," 1960 Sup. Ct. Rev. 158, 158–165. It has exercised this power liberally to regulate, for example, various aspects of maritime employment. See 46 U. S. C. §§ 563–568. Nevertheless, as Mr. Justice Frankfurter stated for the Court in *Romero* v. *International Terminal Operating Co.,* 358 U. S. 354, 373 (1959):

> "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope."

It is unnecessary here to delineate the "wide scope" within which the States may legislate about things maritime. To refute the notion that the high seas are a species of federal enclave, it is sufficient to point out that the Court has found state legislation pre-empted *only* when the nature of the problem required the application of a uniform rule or when the state law unduly hampered maritime commerce. See, *e. g., Askew* v. *American Waterways Operators, Inc.,* 411 U. S. 325, 337–344 (1973); *Kossick* v. *United Fruit Co.,* 365 U. S. 731, 738–739 (1961); *Huron Cement Co.* v. *Detroit,* 362 U. S. 440, 444 (1960). The Court has never struck

down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean "territory."

The petitioners appear also to argue, however, that even if the high seas are not a territory over which Congress exercises exclusive lawmaking power, the Texas rule outlawing union shops must fall because the Federal Government has pre-empted the field of maritime labor relations. Cf. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 216 (1917); Currie, *supra*, at 165 *passim*. It is true that Congress has deeply involved itself in the affairs of seamen. Federal maritime law covers, among other things, maritime liens for the collection of wages, 46 U. S. C. § 953, the rights of seamen to receive at every port half of unpaid wages earned, 46 U. S. C. § 597, and double payment of wages withheld without sufficient cause, 46 U. S. C. § 596, physical qualifications and requirements for seamen, 46 U. S. C. § 672, and disciplinary problems, 46 U. S. C. §§ 701–710.

Despite this manifest federal interest in many aspects of the maritime employment relationship, I think that Texas law still controls. Section 14 (b) on its face clearly settles any apparent conflict between state and federal law in favor of the state rule. In enacting § 14 (b) Congress concluded that diversity in the area of union-security agreements would compromise no federal interest. "By making the matter one of state law, Congress has not only authorized multiformity on the subject, but practically guaranteed it." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 317 (1971) (WHITE, J., dissenting).

When Congress has in the past determined that the nature of an interstate industry requires application of a uniform rule to govern union-security agreements, it has not hesitated to act. For example, before 1951 the Railway Labor Act, 45 U. S. C. § 152 Fifth, prohibited the

union shop. Fully aware of § 14 (b) of the National Labor Relations Act, Congress amended the Railway Labor Act in 1951 to permit railroad carriers and their employees to enter into union-shop agreements "[n]otwithstanding any other provisions of this [Act], or of any other statute or law of the United States, or Territory thereof, or of any State . . . ." 45 U. S. C. § 152 Eleventh. See *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225 (1956). That Congress has not similarly legislated for the maritime industry is compelling evidence that it finds compatible with federal interests diversity among the States as to permissible union-security agreements.

In conclusion, I believe that the place of hiring is the critical factor in determining the choice of law for union-security agreements. But even if the place where the work is to be performed is the criterion, Texas law should still be applied, since under this collective-bargaining agreement more work is performed in that State than in any other, and Congress has refrained from either establishing or indicating a need for a uniform rule to the contrary in maritime employment. I would, therefore, affirm the judgment before us.

TSC INDUSTRIES, INC., ET AL. *v.* NORTHWAY, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74–1471. Argued March 3, 1976—Decided June 14, 1976

Rule 14a–9, promulgated under § 14 (a) of the Securities Exchange Act of 1934, provides that no proxy solicitation shall be made "which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." The dispute in this case centers on the acquisition of petitioner TSC Industries (TSC) by petitioner National Industries (National). National purchased 34% of TSC's voting securities from TSC's founder and principal shareholder and his family. The founder and his son promptly resigned from TSC's board of directors, and five National nominees were placed on the board, including National's president and executive vice president, who subsequently became, respectively, chairman of the board and chairman of TSC's executive committee. Thereafter, the TSC board approved a proposal to liquidate and sell all of TSC's assets to National by exchanging TSC common and preferred stock for National preferred stock and warrants to purchase National common stock. TSC and National then issued a joint proxy statement to their shareholders recommending approval of the proposal. The proxy solicitation was successful, TSC was placed in liquidation and dissolution, and the exchange of shares was effected. Respondent, a TSC shareholder, brought this action for damages, restitution, and other relief against TSC and National, claiming that their joint proxy statement was incomplete and materially misleading in violation of § 14 (a) and Rule 14a–9 in that it omitted material facts relating to the degree of National's control over TSC (*i. e.*, it failed to disclose the positions in TSC held by National's president and executive vice president, and reports filed with the Securities and Exchange Commission by National and TSC indicating that National "may be deemed a 'parent' of TSC") and the favorability of the proposed acquisition to TSC shareholders (*i. e.*, it failed to disclose certain unfavorable information about the proposal contained in a letter from an investment banking firm whose earlier favorable opinion of the

proposal was reported in the proxy statement, and also recent substantial purchases of National's common stock, suggestive of manipulation, by National and a mutual fund). The District Court denied respondent's motion for summary judgment, but the Court of Appeals reversed, holding that the claimed omissions of fact were material as a matter of law, and defining material facts as "all facts which a reasonable shareholder *might* consider important." *Held:*

1. The general standard of materiality best comporting with Rule 14a–9's policies is not the standard applied by the Court of Appeals but is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with the general description of materiality as a requirement that "the defect have a significant *propensity* to affect the voting process." *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 384. It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote, but contemplates a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the reasonable shareholder's deliberations. Pp. 444–449.

2. The issue of materiality is a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts, and only if the established omissions are "so obviously important to an investor that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment. P. 450.

3. Under the standard set forth in ¶ 1, *supra*, none of the omissions claimed to have been in violation of Rule 14a–9 in this case were, so far as the record reveals, materially misleading as a matter of law, and hence respondent was not entitled to summary judgment. Pp. 450–463.

512 F. 2d 324, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Joseph N. Morency, Jr., argued the cause for petitioners. With him on the briefs were *James T. Otis*,

Wesley S. Walton, Milton V. Freeman, and *Werner J. Kronstein.*

Harry B. Reese argued the cause for respondent. With him on the brief were *Arnold I. Shure, Stanley B. Block, Willard J. Lassers, Charles R. Kaufman,* and *Alex Elson.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The proxy rules promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 bar the use of proxy statements that are false or misleading with respect to the presentation or omission of material facts. We are called upon to consider the definition of a material fact under those rules, and the appropriateness of resolving the question of materiality by summary judgment in this case.

I

The dispute in this case centers on the acquisition of petitioner TSC Industries, Inc., by petitioner National Industries, Inc. In February 1969 National acquired 34% of TSC's voting securities by purchase from Charles E. Schmidt and his family. Schmidt, who had been TSC's founder and principal shareholder, promptly resigned along with his son from TSC's board of directors. Thereafter, five National nominees were placed on TSC's board; and Stanley R. Yarmuth, National's president and chief executive officer, became chairman of the TSC board, and Charles F. Simonelli, National's executive vice president, became chairman of the TSC executive committee. On October 16, 1969, the TSC board, with

Solicitor General Bork and *David Ferber* filed a brief for the Securities and Exchange Commission as *amicus curiae* urging affirmance.

the attending National nominees abstaining, approved a proposal to liquidate and sell all of TSC's assets to National. The proposal in substance provided for the exchange of TSC common and Series 1 preferred stock for National Series B preferred stock and warrants.[1] On November 12, 1969, TSC and National issued a joint proxy statement to their shareholders, recommending approval of the proposal. The proxy solicitation was successful, TSC was placed in liquidation and dissolution, and the exchange of shares was effected.

This is an action brought by respondent Northway, a TSC shareholder, against TSC and National, claiming that their joint proxy statement was incomplete and materially misleading in violation of § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n (a),[2] and Rules 14a–3 and 14a–9, 17 CFR §§ 240.14a–3, 240.14a–9 (1975), promulgated thereunder.[3] The basis

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[1] Each share of TSC common stock brought .5 share of National Series B preferred stock and 1½ National warrants. Each share of TSC Series 1 preferred stock brought .6 share of National Series B preferred stock and one National warrant. National Series B preferred stock is convertible into .75 share of National common stock. A National warrant entitles the holder to purchase one share of National common stock at a fixed price until October 1978.

[2] Section 14 (a) provides:

"It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title."

[3] Northway also alleged in its complaint that National pursued a fraudulent plan to acquire TSC for less than its fair value in violation of § 10 (b) of the Securities Exchange Act, 15 U. S. C. § 78j (b),

of Northway's claim under Rule 14a–3 is that TSC and National failed to state in the proxy statement that the transfer of the Schmidt interests in TSC to National had given National control of TSC.[4] The Rule 14a–9 claim, insofar as it concerns us,[5] is that TSC and National omitted from the proxy statement material facts relating to the degree of National's control over TSC

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and Rule 10b–5, 17 CFR § 240.10b–5 (1975), promulgated thereunder. Northway has not pursued this claim in the proceedings that we are called upon to review. Northway also brought suit against Charles Schmidt and his family, charging them with aiding and abetting the corporate defendants in violation of § 10 (b) and Rule 10b–5. The District Court granted summary judgment to the Schmidt defendants, and the Court of Appeals affirmed. That aspect of the original suit is not before us.

[4] Rule 14a–3 (a) provides:

"No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information specified in Schedule 14A."

Schedule 14A, Item 5 (e), requires:

"If to the knowledge of the persons on whose behalf the solicitation is made a change in control of the issuer has occurred since the beginning of its last fiscal year, state the name of the person or persons who acquired such control, the basis of such control, the date and a description of the transaction or transactions in which control was acquired and the percentage of voting securities of the issuer now owned by such person or persons." 17 CFR § 240.14a–101, Item 5 (e) (1975).

[5] Northway also asserted a claim under Rule 14a–9 that the proxy statement was materially misleading in its assertion that the TSC board of directors had approved the proposed transaction. It contended, first, that the proposal was never legally approved under applicable state law; and, second, that the statement should have in any event disclosed that the proposal received only four affirmative votes, and that the National nominees were cautioned against voting by their legal advisers. The Court of Appeals did not reach the first contention, and it found summary judgment inappropriate on the second. Neither contention is before us.

and the favorability of the terms of the proposal to TSC shareholders.[6]

Northway filed its complaint in the United States District Court for the Northern District of Illinois on December 4, 1969, the day before the shareholder meeting on the proposed transaction, but while it requested injunctive relief it never so moved. In 1972 Northway amended its complaint to seek money damages, restitution, and other equitable relief. Shortly thereafter, Northway moved for summary judgment on the issue of TSC's and National's liability. The District Court denied the motion, but granted leave to appeal pursuant to 28 U. S. C. § 1292 (b). The Court of Appeals for the Seventh Circuit agreed with the District Court that there existed a genuine issue of fact as to whether National's acquisition of the Schmidt interests in TSC had resulted in a change of control, and that summary judgment was therefore inappropriate on the Rule 14a–3 claim. But the Court of Appeals reversed the District Court's denial of summary judgment to Northway on its Rule 14a–9 claims, holding that certain omissions of fact were material as a matter of law. 512 F. 2d 324 (1975).

We granted certiorari because the standard applied by the Court of Appeals in resolving the question of materiality appeared to conflict with the standard applied by other Courts of Appeals. 423 U. S. 820 (1975).

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[6] Rule 14a–9 (a) provides:

"No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

We now hold that the Court of Appeals erred in ordering that partial summary judgment be granted to Northway.

II

A

As we have noted on more than one occasion, § 14 (a) of the Securities Exchange Act "was intended to promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'" *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 381 (1970), quoting H. R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 12 (1934). See also *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 431 (1964). In *Borak*, the Court held that § 14 (a)'s broad remedial purposes required recognition under § 27 of the Securities Exchange Act, 15 U. S. C. § 78aa, of an implied private right of action for violations of the provision. And in *Mills*, we attempted to clarify to some extent the elements of a private cause of action for violation of § 14 (a). In a suit challenging the sufficiency under § 14 (a) and Rule 14a–9 of a proxy statement soliciting votes in favor of a merger, we held that there was no need to demonstrate that the alleged defect in the proxy statement actually had a decisive effect on the voting. So long as the misstatement or omission was material, the causal relation between violation and injury is sufficiently established, we concluded, if "the proxy solicitation itself . . . was an essential link in the accomplishment of the transaction." 396 U. S., at 385. After *Mills*, then, the content given to the notion of materiality assumes heightened significance.[7]

[7] Our cases have not considered, and we have no occasion in this case to consider, what showing of culpability is required to establish the liability under § 14 (a) of a corporation issuing a materially

B

The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor. Variations in the formulation of a general test of materiality occur in the articulation of just how significant a fact must be or, put another way, how certain it must be that the fact would affect a reasonable investor's judgment.

The Court of Appeals in this case concluded that material facts include "all facts which a reasonable shareholder *might* consider important." 512 F. 2d, at 330 (emphasis added). This formulation of the test of materiality has been explicitly rejected by at least two courts as setting too low a threshold for the imposition of liability under Rule 14a–9. *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F. 2d 1281, 1301–1302 (CA2 1973); *Smallwood* v. *Pearl Brewing Co.*, 489 F. 2d 579, 603–604 (CA5 1974). In these cases, panels of the Second and Fifth Circuits opted for the conventional tort test of materiality—whether a reasonable man *would* attach importance to the fact misrepresented or omitted in determining his course of action. See Restatement (Second) of Torts § 538 (2)(a) (Tent. Draft No. 10, Apr. 20, 1964). See also American Law Institute, Federal Securities Code § 256 (a) (Tent. Draft No. 2, 1973).[8] *Gerstle*

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misleading proxy statement, or of a person involved in the preparation of a materially misleading proxy statement. See *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F. 2d 1281, 1298–1301 (CA2 1973); *Richland* v. *Crandall*, 262 F. Supp. 538, 553 n. 12 (SDNY 1967); R. Jennings & H. Marsh, Securities Regulation: Cases and Materials 1358–1359 (3d ed. 1972). See also *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 209 n. 28 (1976).

[8] This standard, or a close approximation, has been widely recited in cases involving various sections of the securities laws. See, *e. g.*, *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F. 2d 341,

v. *Gamble-Skogmo, supra,* at 1302, also approved the following standard, which had been formulated with reference to statements issued in a contested election: "whether, taking a properly realistic view, there is a substantial likelihood that the misstatement or omission may have led a stockholder to grant a proxy to the solicitor or to withhold one from the other side, whereas in the absence of this he would have taken a contrary course." *General Time Corp.* v. *Talley Industries, Inc.,* 403 F. 2d 159, 162 (CA2 1968), cert. denied, 393 U. S. 1026 (1969).

In arriving at its broad definition of a material fact as one that a reasonable shareholder *might* consider important, the Court of Appeals in this case relied heavily upon language of this Court in *Mills* v. *Electric Auto-Lite Co., supra.* That reliance was misplaced. The *Mills* Court did characterize a determination of materiality as at least "embod[ying] a conclusion that the

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363 (CA2 1973) (§ 14 (e)); *John R. Lewis, Inc.* v. *Newman,* 446 F. 2d 800, 804 (CA5 1971) (§ 10 (b)); *Gilbert* v. *Nixon,* 429 F. 2d 348, 355–356 (CA10 1970) (§ 10 (b) of the Securities Exchange Act and § 12 (2) of the Securities Act of 1933, 15 U. S. C. § 78*l*); *Rogen* v. *Ilikon Corp.,* 361 F. 2d 260, 266 (CA1 1966) (§ 10 (b)); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F. 2d 833, 849 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC,* 394 U. S. 976 (1969) (§ 10 (b)); *List* v. *Fashion Park, Inc.,* 340 F. 2d 457, 462 (CA2), cert. denied *sub nom. List* v. *Lerner,* 382 U. S. 811 (1965) (§ 10 (b)); *Kohler* v. *Kohler Co.,* 319 F. 2d 634, 642 (CA7 1963) (§ 10 (b)). But see *Sonesta Int'l Hotels Corp.* v. *Wellington Associates,* 483 F. 2d 247, 251 (CA2 1973). In several of these cases, the courts have also defined materiality to encompass those facts "which in reasonable and objective contemplation might affect the value" of the securities involved. *Rogen* v. *Ilikon, supra; SEC* v. *Texas Gulf Sulphur, supra; List* v. *Fashion Park, Inc., supra; Kohler* v. *Kohler Co., supra.* The standard adopted by the Court of Appeals in this case has been applied in *Kohn* v. *American Metal Climax, Inc.,* 458 F. 2d 255, 269 (CA3 1972) (§ 10 (b)), and *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F. 2d 846, 851 (CA3 1973) (§ 14 (e)).

defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote." 396 U. S., at 384. But if any language in *Mills* is to be read as suggesting a general notion of materiality, it can only be the opinion's subsequent reference to materiality as a "requirement that the defect have a significant *propensity* to affect the voting process." *Ibid.* (Emphasis in original.) For it was that requirement that the Court said "adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by § 14 (a)." *Ibid.* Even this language must be read, however, with appreciation that the Court specifically declined to consider the materiality of the omissions in *Mills*. *Id.*, at 381 n. 4. The references to materiality were simply preliminary to our consideration of the sole question in the case—whether proof of the materiality of an omission from a proxy statement must be supplemented by a showing that the defect actually caused the outcome of the vote. It is clear, then, that *Mills* did not intend to foreclose further inquiry into the meaning of materiality under Rule 14a–9.[9]

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[9] Nor is *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972), also relied upon by the Court of Appeals, dispositive. There we held that when a Rule 10b–5 violation involves a failure to disclose, "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.*, at 153–154. The conclusion embodied in the quoted language was simply that positive proof of reliance is unnecessary when materiality is established, and in order to reach that conclusion it was not necessary to articulate a precise definition of materiality, but only to give a "sense" of the notion. The quoted language did not purport to do more.

C

In formulating a standard of materiality under Rule 14a–9, we are guided, of course, by the recognition in *Borak* and *Mills* of the Rule's broad remedial purpose. That purpose is not merely to ensure by judicial means that the transaction, when judged by its real terms, is fair and otherwise adequate, but to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice. See *Mills*, 396 U. S., at 381. As an abstract proposition, the most desirable role for a court in a suit of this sort, coming after the consummation of the proposed transaction, would perhaps be to determine whether in fact the proposal would have been favored by the shareholders and consummated in the absence of any misstatement or omission. But as we recognized in *Mills, supra*, at 382 n. 5, such matters are not subject to determination with certainty. Doubts as to the critical nature of information misstated or omitted will be commonplace. And particularly in view of the prophylactic purpose of the Rule and the fact that the content of the proxy statement is within management's control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect. *Mills, supra*, at 385.

We are aware, however, that the disclosure policy embodied in the proxy regulations is not without limit. See *id.*, at 384. Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good. The potential liability for a Rule 14a–9 violation can be great indeed, and if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is

hardly conducive to informed decisionmaking. Precisely these dangers are presented, we think, by the definition of a material fact adopted by the Court of Appeals in this case—a fact which a reasonable shareholder *might* consider important. We agree with Judge Friendly, speaking for the Court of Appeals in *Gerstle,* that the "might" formulation is "too suggestive of mere possibility, however unlikely." 478 F. 2d, at 1302.

The general standard of materiality that we think best comports with the policies of Rule 14a–9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills'* general description of materiality as a requirement that "the defect have a significant *propensity* to affect the voting process." It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[10]

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[10] In defining materiality under Rule 14a–9, we are, of course, giving content to a rule promulgated by the SEC pursuant to broad statutory authority to promote "the public interest" and "the protection of investors." See n. 2, *supra.* Cf. *Ernst & Ernst* v. *Hochfelder,* 425 U. S., at 212–214. Under these circumstances, the SEC's view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability is entitled to consideration. Cf. *Northern Indiana Public Service Co.* v. *Izaac Walton League,* 423 U. S. 12, 15 (1975); *Udall* v. *Tallman,* 380

D

The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate,[11] we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.[12] Only if the established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment. *Johns Hopkins University* v. *Hutton*, 422 F. 2d 1124, 1129 (CA4 1970). See *Smallwood* v. *Pearl Brewing Co.*, 489 F. 2d, at 604; *Rogen* v. *Ilikon Corp.*, 361 F. 2d 260, 265–267 (CA1 1966).

III

The omissions found by the Court of Appeals to have been materially misleading as a matter of law involved two general issues—the degree of National's control over TSC at the time of the proxy solicitation, and the favor-

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U. S. 1, 16–17 (1965). The standard we adopt is supported by the SEC. Brief for the Securities and Exchange Commission as *Amicus Curiae* 13.

[11] Federal Rule Civ. Proc. 56 (c) permits summary judgment only when "there is no genuine issue as to any material fact."

[12] In an analogous context, the jury's unique competence in applying the "reasonable man" standard is thought ordinarily to preclude summary judgment in negligence cases. See 10 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2729 (1973).

ability of the terms of the proposed transaction to TSC shareholders.

A. *National's Control of TSC*

The Court of Appeals concluded that two omitted facts relating to National's potential influence, or control, over the management of TSC were material as a matter of law. First, the proxy statement failed to state that at the time the statement was issued, the chairman of the TSC board of directors was Stanley Yarmuth, National's president and chief executive officer, and the chairman of the TSC executive committee was Charles Simonelli, National's executive vice president. Second, the statement did not disclose that in filing reports required by the SEC, both TSC and National had indicated that National "may be deemed to be a 'parent' of TSC as that term is defined in the Rules and Regulations under the Securities Act of 1933." App. 490, 512, 517.[13] The

[13] The quoted language is from National's Form 13D, filed in compliance with § 13 (d) of the Securities Exchange Act, 15 U. S. C. § 78m (d). See 17 CFR § 240.13d–1 (1975). Substantially identical language appeared in TSC's Form 10–K, and was incorporated by reference into its Form 8–K, both filed in compliance with § 13 (a) of the Securities Exchange Act, 15 U. S. C. § 78m (a). See 17 CFR §§ 240.13a–10–11 (1975). The term "parent" is defined in SEC Rule 12b–2 (a), (f), (k), 17 CFR §§ 240.12b–2 (a), (f), (k) (1975):

"Unless the context otherwise requires, the following terms, when used in the rules contained in this regulation or in Regulation 13A or 15D or in the forms for statements and reports filed pursuant to sections 12, 13 or 15 (d) of the [Securities Exchange] Act, shall have the respective meanings indicated in this rule:

"(a) *Affiliate.* An 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

. . . . .

"(f) *Control.* The term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means

Court of Appeals noted that TSC shareholders were relying on the TSC board of directors to negotiate on their behalf for the best possible rate of exchange with National. It then concluded that the omitted facts were material because they were "persuasive indicators that the TSC board was in fact under the control of National, and that National thus 'sat on both sides of the table' in setting the terms of the exchange." 512 F. 2d, at 333.

We do not agree that the omission of these facts, when viewed against the disclosures contained in the proxy statement, warrants the entry of summary judgment against TSC and National on this record. Our conclusion is the same whether the omissions are considered separately or together.

The proxy statement prominently displayed the facts that National owned 34% of the outstanding shares in TSC, and that no other person owned more than 10%. App. 262–263, 267. It also prominently revealed that 5 out of 10 TSC directors were National nominees, and it recited the positions of those National nominees with National—indicating, among other things, that Stanley Yarmuth was president and a director of National, and that Charles Simonelli was executive vice president and a director of National. *Id.*, at 267. These disclosures clearly revealed the nature of National's relationship with TSC and alerted the reasonable shareholder to the fact that National exercised a degree of influence over TSC. In view of these disclosures, we certainly cannot

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the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

. . . . .

"(k) *Parent*. A 'parent' of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries."

The Rules and Regulations under the Securities Act of 1933 contain the identical definitions. 17 CFR §§ 230.405 (a), (f), (n) (1975).

say that the additional facts that Yarmuth was chairman of the TSC board of directors and Simonelli chairman of its executive committee were, on this record, so obviously important that reasonable minds could not differ on their materiality.

Nor can we say that it was materially misleading as a matter of law for TSC and National to have omitted reference to SEC filings indicating that National "may be deemed to be a parent of TSC." As we have already noted, both the District Court and the Court of Appeals concluded, in denying summary judgment on the Rule 14a–3 claim, that there was a genuine issue of fact as to whether National actually controlled TSC at the time of the proxy solicitation. We must assume for present purposes, then, that National did not control TSC. On that assumption, TSC and National obviously had no duty to state without qualification that control did exist. If the proxy statements were to disclose the conclusory statements in the SEC filings that National "may be deemed to be a parent of TSC," then it would have been appropriate, if not necessary, for the statement to have included a disclaimer of National control over TSC or a disclaimer of knowledge as to whether National controlled TSC.[14] The net contribution of including the contents of the SEC filings accompanied by such disclaimers is not of such obvious significance, in view of the other facts contained in the proxy statement, that their exclusion renders the statement materially misleading as a matter of law.[15]

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[14] It is the position of National and TSC that "[s]ince National and the old TSC management . . . never drew any clear-cut battle lines, no one ever really knew who could ultimately control TSC during the entire period between the Schmidt purchase and consummation of the shareholder-approved purchase of TSC's assets." Brief for Petitioners 33.

[15] We emphasize that we do not intend to imply that facts suggestive of control need be disclosed only if in fact there was con-

B. *Favorability of the Terms to TSC Shareholders*

The Court of Appeals also found that the failure to disclose two sets of facts rendered the proxy statement materially deficient in its presentation of the favorability of the terms of the proposed transaction to TSC shareholders. The first omission was of information, described by the Court of Appeals as "bad news" for TSC shareholders, contained in a letter from an investment banking firm whose earlier favorable opinion of the fairness of the proposed transaction was reported in the proxy statement. The second omission related to purchases of National common stock by National and by Madison Fund, Inc., a large mutual fund, during the two years prior to the issuance of the proxy statement.

1

The proxy statement revealed that the investment banking firm of Hornblower & Weeks-Hemphill, Noyes had rendered a favorable opinion on the fairness to TSC shareholders of the terms for the exchange of TSC shares for National securities. In that opinion, the proxy statement explained, the firm had considered, "among other

trol. If, for example, the proxy statement in this case had failed to reveal National's 34% stock interest in TSC and the presence of five National nominees on TSC's board, these omissions would have rendered the statement materially misleading as a matter of law, regardless of whether National can be said with certainty to have been in "control" of TSC. The reasons for this are twofold. First, to the extent that the existence of control was, at the time of the proxy statement's issuance, a matter of doubt to those responsible for preparing the statement, we would be unwilling to resolve that doubt against disclosure of facts so obviously suggestive of control. Second, and perhaps more to the point, even if National did not "control" TSC, its stock ownership and position on the TSC board make it quite clear that it enjoyed some influence over TSC, which would be of obvious importance to TSC shareholders.

things, the current market prices of the securities of both corporations, the high redemption price of the National Series B preferred stock, the dividend and debt service requirements of both corporations, the substantial premium over current market values represented by the securities being offered to TSC stockholders, and the increased dividend income." App. 267.

The Court of Appeals focused upon the reference to the "substantial premium over current market values represented by the securities being offered to TSC stockholders," and noted that any TSC shareholder could calculate the apparent premium by reference to the table of current market prices that appeared four pages later in the proxy statement. *Id.*, at 271. On the basis of the recited closing prices for November 7, 1969, five days before the issuance of the proxy statement, the apparent premiums were as follows. Each share of TSC Series 1 preferred, which closed at $12, would bring National Series B preferred stock and National warrants worth $15.23—for a premium of $3.23, or 27% of the market value of the TSC Series 1 preferred. Each share of TSC common stock, which closed at $13.25, would bring National Series B preferred stock and National warrants worth $16.19—for a premium of $2.94, or 22% of the market value of TSC common.[16]

[16] The premium based upon November 7, 1969, closing prices is calculated as follows:

	TSC Preferred	TSC Common
National B pfd. at (16⅝)	$9.98 (.6 sh.)	$8.31 (.5 sh.)
National warrant (at 5¼)	5.25	7.88 (1½ war.)
Total	$15.23	$16.19
Less TSC market (pfd. 12) com. 13¼)	12.00	13.25
Premium	3.23	2.94
Premium expressed as a percentage of TSC market	27%	22%

The closing price of the National warrants on November 7, 1969, was, as indicated in the proxy statement, $5.25. The TSC shareholders were misled, the Court of Appeals concluded, by the proxy statement's failure to disclose that in a communication two weeks after its favorable opinion letter, the Hornblower firm revealed that its determination of the fairness of the offer to TSC was based on the conclusion that the value of the warrants involved in the transaction would not be their current market price, but approximately $3.50. If the warrants were valued at $3.50 rather than $5.25, and the other securities valued at the November 7 closing price, the court figured, the apparent premium would be substantially reduced—from $3.23 (27%) to $1.48 (12%) in the case of the TSC preferred, and from $2.94 (22%) to $0.31 (2%) in the case of TSC common. "In simple terms," the court concluded: "TSC and National had received some good news and some bad news from the Hornblower firm. They chose to publish the good news and omit the bad news." 512 F. 2d, at 335.

It would appear, however, that the subsequent communication from the Hornblower firm, which the Court of Appeals felt contained "bad news," contained nothing new at all. At the TSC board of directors meeting held on October 16, 1969, the date of the initial Hornblower opinion letter, Blancke Noyes, a TSC director and a partner in the Hornblower firm, had pointed out the likelihood of a decline in the market price of National warrants with the issuance of the additional warrants involved in the exchange, and reaffirmed his conclusion that the exchange offer was a fair one nevertheless. The subsequent Hornblower letter, signed by Mr. Noyes, purported merely to explain the basis of the calculations underlying the favorable opinion rendered in the Oc-

tober 16 letter. "In advising TSC as to the fairness of the offer from [National]," Mr. Noyes wrote, "we concluded that the warrants in question had a value of approximately $3.50." [17] On its face, then, the subsequent letter from Hornblower does not appear to have contained anything to alter the favorable opinion rendered in the October 16 letter—including the conclusion that the securities being offered to TSC shareholders represented a "substantial premium over current market values."

The real question, though, is not whether the subsequent Hornblower letter contained anything that altered the Hornblower opinion in any way. It is, rather,

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[17] The body of the subsequent Hornblower letter, dated October 31, 1969, from Mr. Noyes to Stanley Yarmuth, president of National, reads in full:

"You have asked for our opinion as to the value of warrants to be issued in connection with your proposed acquisition of TSC Industries. We understand that these warrants have terms identical to the National Industries (NII) warrants listed on the American Stock Exchange which allow the holder to purchase one NII Common at the price of $21.40 until October 31, 1978. We further understand that you desire our determination as of October 9, 1969.

"Our evaluation of these warrants was made from the point of view of the stockholders of TSC Industries, of which I am a director. In advising TSC as to the fairness of the offer from NII it was necessary to determine whether the value of the warrants was reflected by the market price of the outstanding 487,000 warrants on the day in question. We did so in the light of the fact that approximately 2.6 million additional warrants would be issued in connection with the acquisition.

"After studying price relationships of other warrants traded publicly, referring to customary systems of warrant evaluation, and considering the particulars of the proposed acquisition, we concluded that the warrants in question had a value of approximately $3.50.

"If you have any questions concerning our evaluation, please feel free to call." App. 519.

whether the advice given at the October 16 meeting, and reduced to more precise terms in the subsequent Hornblower letter—that there might be a decline in the market price of the National warrants—had to be disclosed in order to clarify the import of the proxy statement's reference to "the substantial premium over current market values represented by the securities being offered to TSC stockholders." We note initially that the proxy statement referred to the substantial premium as but one of several factors considered by Hornblower in rendering its favorable opinion of the terms of exchange. Still, we cannot assume that a TSC shareholder would focus only on the "bottom line" of the opinion to the exclusion of the considerations that produced it.

TSC and National insist that the reference to a substantial premium required no clarification or supplementation, for the reason that there was a substantial premium even if the National warrants are assumed to have been worth $3.50. In reaching the contrary conclusion, the Court of Appeals, they contend, ignored the rise in price of TSC securities between early October 1969, when the exchange ratio was set, and November 7, 1969—a rise in price that they suggest was a result of the favorable exchange ratio's becoming public knowledge. When the proxy statement was mailed, TSC and National contend, the market price of TSC securities already reflected a portion of the premium to which Hornblower had referred in rendering its favorable opinion of the terms of exchange. Thus, they note that Hornblower assessed the fairness of the proposed transaction by reference to early October market prices of TSC preferred, TSC common, and National preferred. On the basis of those prices and a $3.50 value for the National warrants involved in the exchange, TSC and National contend that the premium was substantial.

Each share of TSC preferred, selling in early October at $11, would bring National preferred stock and warrants worth $13.10—for a premium of $2.10, or 19%. And each share of TSC common, selling in early October at $11.63, would bring National preferred stock and warrants worth $13.25—for a premium of $1.62, or 14%.[18] We certainly cannot say as a matter of law that these premiums were not substantial. And if, as we must assume in considering the appropriateness of summary judgment, the increase in price of TSC's securities from early October to November 7 reflected in large part the market's reaction to the terms of the proposed exchange, it was not materially misleading as a matter of law for the proxy statement to refer to the existence of a substantial premium.

There remains the possibility, however, that although TSC and National may be correct in urging the existence of a substantial premium based upon a $3.50 value for the National warrants and the early October market prices of the other securities involved in the transaction, the proxy statement misled the TSC shareholder to calculate a premium substantially in excess of that premium. The premiums apparent from early October

[18] The premium based upon a $3.50 value for the National warrants and the closing prices of the other securities involved on October 9, 1969, the day the exchange ratio was set, is calculated as follows:

	TSC Preferred	TSC Common
National B pfd. (at 16)....	$9.60 (.6 sh.)	$8.00 (.5 sh.)
National warrant (at 3.50).	3.50	5.25 (1½ war.)
Total	$13.10	$13.25
Less TSC market (pfd. 11) (com. 11⅝).....	11.00	11.63
Premium	2.10	1.62
Premium expressed as a percentage of TSC market.	19%	14%

market prices and a $3.50 value for the National warrants—19% on TSC preferred and 14% on TSC common—are certainly less than those that would be derived through use of the November 7 closing prices listed in the proxy statement—27% on TSC preferred and 22% on TSC common. But we are unwilling to sustain a grant of summary judgment to Northway on that basis. To do so we would have to conclude as a matter of law, first, that the proxy statement would have misled the TSC shareholder to calculate his premium on the basis of November 7 market prices, and second, that the difference between that premium and that which would be apparent from early October prices and a $3.50 value for the National warrants was material. These are questions we think best left to the trier of fact.

2

The final omission that concerns us relates to purchases of National common stock by National and by Madison Fund, Inc., a mutual fund. Northway notes that National's board chairman was a director of Madison, and that Madison's president and chief executive, Edward Merkle, was employed by National pursuant to an agreement obligating him to provide at least one day per month for such duties as National might request.[19] Northway contends that the proxy statement, having called the TSC shareholders' attention to the market prices of the securities involved in the proposed transaction, should have revealed substantial purchases of National common stock made by National and Madison during the two years prior to the issuance of the proxy

[19] Employed in 1967, Merkle initially received a salary of $2,500 per year (increased in 1968 to $12,000) and an option to purchase 10,000 shares of National common stock. App. 520, 522.

statement.[20] In particular, Northway contends that the TSC shareholders should, as a matter of law, have been informed that National and Madison purchases accounted for 8.5% of all reported transactions in National common stock during the period between National's acquisition of the Schmidt interests and the proxy solicitation. The theory behind Northway's contention is that disclosure of these purchases would have pointed to the existence, or at least the possible existence, of conspiratorial manipulation of the price of National common stock, which would have had an effect on the market price of the National preferred stock and warrants involved in the proposed transaction.[21]

Before the District Court, Northway attempted to demonstrate that the National and Madison purchases were coordinated. The District Court concluded, however, that there was a genuine issue of fact as to whether there was coordination. Finding that a showing of coordination was essential to Northway's theory, the District Court denied summary judgment.

The Court of Appeals agreed with the District Court that "collusion is not conclusively established." 512 F. 2d, at 336. But observing that "it is certainly suggested," *ibid.*, the court concluded that the failure to disclose the

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[20] In a table entitled "Statements of Consolidated Stockholders' Equity," the proxy statement indicated that National acquired aproximately 83,000 shares of its own common stock in 1968 and 1969, while it sold approximately 67,000 shares under stock option plans, employment agreements, and warrants. *Id.*, at 324, 330. The proxy statement did not disclose that Madison acquired approximately 170,000 shares of National common during the two-year period, or that approximately one year prior to the proxy solicitation Madison acquired $2 million in National debentures convertible to common.

[21] See n. 1, *supra.*

purchases was materially misleading as a matter of law. The court explained:

> "Stockholders contemplating an offer involving preferred shares convertible to common stock and warrants for the purchase of common stock must be informed of circumstances which tend to indicate that the current selling price of the common stock involved may be affected by apparent market manipulations. It was for the shareholders to determine whether the market price of the common shares was relevant to their evaluation of the convertible preferred shares and warrants, or whether the activities of Madison and National actually amounted to manipulation at all." *Ibid.*

In short, while the Court of Appeals viewed the purchases as significant only insofar as they suggested manipulation of the price of National securities, and acknowledged the existence of a genuine issue of fact as to whether there was any manipulation, the court nevertheless required disclosure to enable the shareholders to decide whether there was manipulation or not.

The Court of Appeals' approach would sanction the imposition of civil liability on a theory that undisclosed information may *suggest* the existence of market manipulation, even if the responsible corporate officials knew that there was in fact no market manipulation. We do not agree that Rule 14a–9 requires such a result. Rule 14a–9 is concerned only with whether a proxy statement is misleading with respect to its presentation of material facts. If, as we must assume on a motion for summary judgment, there was no collusion or manipulation whatsoever in the National and Madison purchases—that is, if the purchases were made wholly independently for proper corporate and investment purposes, then by Northway's implicit acknowledgment they had no bear-

ing on the soundness and reliability of the market prices listed in the proxy statement,[22] and it cannot have been materially misleading to fail to disclose them.[23]

That is not to say, of course, that the SEC could not enact a rule specifically requiring the disclosure of purchases such as were involved in this case, without regard to whether the purchases can be shown to have been collusive or manipulative. We simply hold that if liability is to be imposed in this case upon a theory that it was misleading to fail to disclose purchases suggestive of market manipulation, there must be some showing that there was in fact market manipulation.[24]

IV

In summary, none of the omissions claimed to have been in violation of Rule 14a–9 were, so far as the record reveals, materially misleading as a matter of law, and Northway was not entitled to partial summary judgment.

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[22] There has been no suggestion that the purchases in question would have any significance if there was in fact no manipulation or collusion, although there may perhaps be such a claim in another case. Nor is there any indication that manipulation or collusion are matters as to whose existence National might have been left in doubt at the time the proxy statement was issued. Cf. n. 16, *supra*.

[23] In holding that the failure to disclose the National and Madison purchases violated Rule 14a–9 as a matter of law, the Court of Appeals not only found it unnecessary to consider whether there was in fact any collusion or manipulation, but also found it unnecessary to consider whether the purchases had any significant effect on the price of National common stock or, more pertinently, the price of the National preferred stock and warrants involved in the proposed transaction. Since we find the existence of a genuine issue of fact with respect to whether there was manipulation sufficient to bar summary judgment, it is unnecessary to consider the remaining aspects of the Court of Appeals' decision.

[24] Of course, such a showing may be by circumstantial as well as direct evidence, and the purchases themselves may be considered.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Per Curiam

TEXAS *v.* LOUISIANA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 36, Orig. Argued January 19, 1976—Decided June 14, 1976

Louisiana's exception to the portion of the Special Master's report that marks the boundary line between Louisiana and Texas in the Sabine River as it enters into Sabine Lake through the "middle pass" rather than in the geographic middle of the "west pass," is overruled, where the Special Master's determination is consistent with this Court's rejection of the thalweg doctrine in *Texas* v. *Louisiana*, 410 U. S. 702; and Texas' exceptions to the Special Master's delimitation of the lateral seaward boundary are overruled, where the Special Master, after having correctly concluded that there has never been an *established* offshore boundary between the States, correctly applied the Convention on the Territorial Sea and Contiguous Zone, Arts. 12 and 8 of which clearly require that the median line be measured with reference to the jetties at the mouth of the Sabine River.

John L. Hill, Attorney General of Texas, argued the cause for plaintiff. With him on the briefs were *Elizabeth B. Levatino*, First Special Assistant Attorney General, *Daniel O. Goforth*, Special Assistant Attorney General, and *Larry F. York*.

Oliver P. Stockwell, Special Assistant Attorney General of Louisiana, argued the cause for defendant. With him on the briefs were *William J. Guste, Jr.*, Attorney General, *Warren E. Mouledoux* and *Gary Keyser*, Assistant Attorneys General, and *Emmett C. Sole*, Special Assistant Attorney General.

John P. Rupp argued the cause for the United States as intervenor. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Kiechel, William L. Patton, Bruce C. Rashkow*, and *Michael W. Reed*.

PER CURIAM.

We have already decided that the relevant boundary between the States of Texas and Louisiana is the geo-

graphic middle of Sabine Pass, Sabine Lake, and Sabine River from the mouth of the Sabine in the Gulf of Mexico to the thirty-second degree of north latitude. 410 U. S. 702 (1973). We have also held that all islands in the east half of the Sabine River when Louisiana was admitted as a State in 1812, or thereafter formed, belong to Louisiana. Delimitation of the boundary and decision as to ownership of the islands in the west half of the Sabine were deferred pending further proceedings before the Special Master in which the United States was invited to participate. *Id.*, at 712–714.

The litigation subsequently was enlarged upon the motion of Louisiana to include a determination of the lateral seaward boundary between Texas and Louisiana, and Texas and the United States extending into the Gulf of Mexico. 414 U. S. 904 (1973).[1] Pleadings relating to the lateral boundary were filed by the States and by the United States. The United States also claimed title to six of the islands in the western half of the Sabine, 414 U. S. 1107 (1973); it subsequently amended its complaint, however, to withdraw its claim to all islands except one identified as "Sam." 416 U. S. 903 (1974). The city of Port Arthur, Tex., was permitted to intervene for purposes of protecting its interests in the island claims of the United States. 416 U. S. 965 (1974).

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[1] We held in *United States* v. *Louisiana*, 363 U. S. 1 (1960), that under the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, Texas as against the United States was entitled to the natural resources of the seabed and subsoil extending three marine leagues from its coastline into the Gulf, but that Louisiana may claim such rights only for a distance of three geographical miles from its coastline. Thus, for three geographical miles Texas and Louisiana are in dispute as to the location of their boundary. The remaining boundary area out to three marine leagues is in dispute between Texas and the United States.

After hearings on referral, the Special Master has concluded and recommends:

"1) That the boundary between the States of Texas and Louisiana from 32° to 30° north latitude be established as shown upon Texas Exhibit AAA 1–12, pursuant to agreement of the parties.

"2) That the boundary line from 30° north latitude to the Gulf of Mexico and to the terminus of the jetties be established as being the median line marked on Louisiana Exhibits DDD and III and hereinabove described specifically, with the right to the States of Texas and Louisiana to alter such boundary within Sabine Lake by agreement within the time proposed.

"3) That the claim of the United States of America to an island named 'Sam' be denied.

"4) That the lateral boundary in the Gulf of Mexico between the States of Texas and Louisiana and between the State of Texas and the United States of America be established as the line shown on your Special Master's Exhibit and marked 'U. S.'

"5) That the cost be taxed to the parties in accordance with their contribution to the fund established by your Special Master and deposited in the First National Bank & Trust Company, Lincoln, Nebraska; that no costs be taxed for the services of your Special Master herein; that upon the order of termination of this case your Special Master file a report setting forth the amount of money received by him from the parties for the payment of costs and expenses pursuant to his requests and of the disbursement thereof for approval by the Court unless prior thereto the parties in writing have approved your Special Master's report as to the disbursement of said moneys."

Exceptions to the recommendations of the Special Master have been filed by Louisiana and Texas. 423 U. S. 909 (1975).

At approximately 30° north latitude, the Sabine River enters into Sabine Lake through three channels. Louisiana excepts to that portion of the Special Master's report which marks the boundary line between the States through the passage more recently known as "middle pass," instead of in the geographic middle of the "west pass." Louisiana contends that the Special Master acted contrary to our rejection of the thalweg doctrine earlier in this case, 410 U. S., at 709, by considering navigation as the criterion to locate the boundary in the middle channel. We think it clear, however, that the Special Master makes reference to the volume of water flowing through these passes solely in an analytic context reflecting the history and geography of the region. We are persuaded that the Special Master made his determination consistent with our earlier holding.

Texas has filed exceptions to the Special Master's delimitation of the lateral seaward boundary in the Gulf of Mexico. Texas argues that the Special Master erred in concluding that Texas and Louisiana did not have a historic boundary in the Gulf; we think that misreads the findings of the Special Master. The Special Master does not reject Texas' contention that there was a historic "inchoate" boundary; what he concludes is that there has never been an *established* offshore boundary between the States. We find the Special Master correct in his conclusion and conclude that he properly considered how such a boundary should be now constructed.

All parties agree that the lateral seaward boundary is to be constructed by reference to the median line, or equidistant principle, recognized in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U. S. T. (pt. 2) 1606, T. I. A. S. No.

5639.[2] Texas, however, excepts to the Special Master's determination that the equidistant principle is to be applied to the coastlines of the States as affected by jetties at the mouth of the Sabine River.[3] Texas urges that the relevant coastline is the coastline that existed in 1845 when it was admitted to the Union. Texas argues that this is a domestic dispute involving historical precedents and that the States' offshore boundary should be constructed as Congress would have done in 1845 had it considered the matter.

The short answer to Texas' argument is that no line was drawn by Congress and that the boundary is being described in this litigation for the first time. The Court

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[2] Article 12 of the Convention provides:

"1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

"2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States." [1964] 15 U. S. T. (pt. 2), at 1610, T. I. A. S. No. 5639.

[3] There are two jetties—one originating from Texas and one from Louisiana—and each extending approximately 3.1 miles into the Gulf. The jetties were constructed by the United States Army Corps of Engineers in the 1880's to provide an adequate ship canal to the Sabine Pass for the benefit of such cities as Port Arthur, Beaumont, and others. They were completed to their present terminus in 1936.

Article 8 of the Convention provides:

"For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." *Id.*, at 1609, T. I. A. S. No. 5639.

should not be called upon to speculate as to what Congress might have done. We hold that the Special Master correctly applied the Convention on the Territorial Sea and Contiguous Zone to this suit. As we previously have recognized, "the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." *United States* v. *California*, 381 U. S. 139, 165 (1965). When read together, Arts. 12 and 8 of the Convention clearly require that the median line be measured with reference to the jetties.[4]

Accordingly, the exceptions of Louisiana and Texas are overruled. The parties are directed within 90 days to submit a proposed decree which has the approval of the Special Master. If the States cannot agree, the Special Master is requested, after appropriate hearings, to prepare and submit a recommended decree.

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[4] The result is not inconsistent with our holding in *United States* v. *Louisiana*, 389 U. S. 155 (1967), that Texas' three-league grant under the Submerged Lands Act is measured from Texas' historic coastline, without reference to the jetties. We had earlier held that the coastal States had no claim to the submerged lands off their coastlines and that the United States had paramount rights in these lands. *United States* v. *California*, 332 U. S. 19 (1947). This holding was applied to Louisiana and Texas in our first Louisiana decision. *United States* v. *Louisiana*, 339 U. S. 699 (1950). In our 1967 Louisiana decision, *supra*, we were concerned only with interpretation of the statutory grant of the Submerged Lands Act. We concluded that "[n]o definitions are required by this Court and there is no need to resort to international law; Texas has simply been given that amount of submerged land it owned when it entered the Union." 389 U. S., at 160.

BURRELL ET AL. *v.* McCRAY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-44. Argued April 27, 1976—Decided June 14, 1976

516 F. 2d 357, certiorari dismissed as improvidently granted.

Francis B. Burch, Attorney General of Maryland, argued the cause for petitioners. With him on the briefs were *Henry R. Lord,* Deputy Attorney General, and *Clarence W. Sharp, Donald R. Stutman,* and *Glenn E. Bushel,* Assistant Attorneys General.

Charles F. Morgan argued the cause for respondents. With him on the brief were *Barbara M. Milstein, Michael Millemann,* and *C. Christopher Brown.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE WHITE dissents. He would affirm the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, concurring.

Had I been a Member of the Court when the petition for certiorari was presented, I would have voted to deny because the opinion of the United States Court of Ap-

*A brief of *amici curiae* urging reversal was filed for their respective States by *Jim Guy Tucker,* Attorney General of Arkansas, and *Robert A. Newcomb,* Assistant Attorney General; *Evelle J. Younger,* Attorney General of California, *Jack R. Winkler,* Chief Assistant Attorney General, *Edward P. O'Brien,* Assistant Attorney General, and *John T. Murphy,* Deputy Attorney General; *Carl R. Ajello,* Attorney General of Connecticut, and *Stephen J. O'Neill,* Assistant Attorney General; *Arthur K. Bolton,* Attorney General of Georgia, and *G. Thomas Davis,* Assistant Attorney General;

peals for the Fourth Circuit correctly states the applicable law. For the same reason, I voted to affirm after oral argument. Although I did not vote to dismiss the writ as improvidently granted, I do not dissent from that action for two reasons.

First, it is my understanding that at least one Member of the Court who voted to grant certiorari has now voted to dismiss the writ; accordingly, the action of the Court does not impair the integrity of the Rule of Four.

Second, just as the Court's broad control of its discretionary docket includes the power to dismiss the writ because circumstances disclosed by a careful study of the record were not fully apprehended at the time the writ was granted, *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180, 183, so also, we should retain the power to take like action when our further study of the law discloses that there is no need for an opinion of this Court on the questions presented by the petition. Even though I agree with MR. JUSTICE BRENNAN that the questions in

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John C. Danforth, Attorney General of Missouri, and *William F. Arnet*, Assistant Attorney General; *Paul L. Douglas*, Attorney General of Nebraska, and *Harold Mosher*, Assistant Attorney General; *William F. Hyland*, Attorney General of New Jersey, and *Joseph T. Maloney*, Deputy Attorney General; *Toney Anaya*, Attorney General of New Mexico, and *Michael Francke* and *Robert William Piatt, Jr.*, Assistant Attorneys General; *Rufus L. Edmisten*, Attorney General of North Carolina, and *Andrew A. Vanore, Jr.*, Senior Deputy Attorney General; *Larry Derryberry*, Attorney General of Oklahoma, and *Amy Hodgins*, Assistant Attorney General; *Robert P. Kane*, Attorney General of Pennsylvania, and *J. Andrew Smyser*, Deputy Attorney General; *Daniel R. McLeon*, Attorney General of South Carolina, and *Emmet H. Clair*, Assistant Attorney General; and *John L. Hill*, Attorney General of Texas, and *Bert W. Pluymen*, Assistant Attorney General.

Briefs of *amici curiae* urging affirmance were filed by *Alvin Bronstein, Robert Plotkin, Burt Neuborne*, and *Melvin L. Wulf* for the American Civil Liberties Union et al.; and by *Daniel L. Skoler* for the Center for Correctional Justice.

this case are important, I am nevertheless persuaded that the state of the law applicable to the facts disclosed by this record is sufficiently clear that the dismissal of the writ is a permissible exercise of the Court's discretionary power.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Certiorari was granted in this case, 423 U. S. 923, to consider the questions:

> "1. Whether the United States Court of Appeals for the Fourth Circuit erred when it held that exhaustion of state administrative remedies was not required in an action brought pursuant to 42 U. S. C. § 1983.
>
> "2. Whether the United States Court of Appeals for the Fourth Circuit erred when it reversed the judgments of the District Court in *McCray* v. *Burrell,* #74–1042, and *McCray* v. *Smith,* #74–1043, based on a finding that Respondent McCray's Eighth and Fourteenth Amendment rights were violated under the circumstances of those cases and remanded for determinations on the merits." Pet. for Cert. 2–3.

Following the grant of the writ of certiorari, the parties fully briefed and orally argued these questions. The result of their efforts is today's one-line order dismissing the writ of certiorari as improvidently granted. That order plainly flouts the settled principles that govern this Court's exercise of its unquestioned power to dismiss writs of certiorari as improvidently granted.

We have held that such dismissals are proper only when the more intensive consideration of the issues and the record in the case that attends full briefing and oral argument reveals that conditions originally thought to

justify granting the writ of certiorari are not in fact present. "[C]ircumstances . . . 'not . . . fully apprehended at the time certiorari was granted,'" *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 183 (1959), may reveal that an important issue is not in fact presented by the record, or not presented with sufficient clarity in the record, or compel the conclusion that "the standards governing the exercise of our discretionary power of review upon writ of certiorari [such as] . . . 'special and important reasons' for granting the writ . . . , as required by Supreme Court Rule 19," are not met. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 73 (1955). See R. Stern & E. Gressman, Supreme Court Practice 227–230 (4th ed., 1969). No such circumstances have been revealed upon plenary consideration of the legal claims and record in this case; certainly the parties have neither argued nor suggested any. Nor does the Court so explain its action; rather, recognizing the impossibility of any such attempt, it simply orders the writ dismissed. I can only conclude that in today's action—an action which renders our discretionary jurisdiction an essentially arbitrary jurisdiction—the Court is not pursuing our "duty to avoid decision of constitutional issues" only where reason and principle justify doing so; rather, this is plainly an instance where "avoidance becomes evasion." *Rice* v. *Sioux City Cemetery*, *supra*, at 74.

Further, a Justice who originally voted to deny the petition for writ of certiorari is, of course, privileged to participate in a dismissal as improvidently granted that is justified under the *Monrosa* standard. See *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 559 (1957) (Harlan, J., concurring and dissenting); *United States* v. *Shannon*, 342 U. S. 288, 294 (1952). But I hold the view that impermissible violence is done the Rule of Four when a Justice who voted to deny the petition for certiorari participates after oral argument in a dismissal

that, as here, is not justified under the governing standard, but which rather reflects only the factors that motivated the original vote to deny. *Ferguson* v. *Moore-McCormack Lines, supra,* at 559–562 (Harlan, J., concurring and dissenting). In this circumstance, I share the view stated by Mr. Justice Douglas, dissenting in *United States* v. *Shannon, supra,* at 298:

> "A Justice who has voted to deny the writ of certiorari is in no position after argument to vote to dismiss the writ as improvidently granted. Only those who have voted to grant the writ have that privilege. The reason strikes deep. If after the writ is granted or after argument, those who voted to deny certiorari vote to dismiss the writ as improvidently granted, the integrity of our certiorari jurisdiction is impaired. By long practice—announced to the Congress and well-known to this Bar—it takes four votes out of a Court of nine to grant a petition for certiorari. If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired."

I would reach the merits and affirm the judgment of the Court of Appeals.

RALSTON PURINA CO. ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

No. 75–1015. Decided June 14, 1976

Concluding from the protesting appellant feed manufacturers' evidence that, though appellee railroads' proposed new tariffs would increase through rates on meal and related articles used in making feed, the railroads would lose revenue because of diversion of meal traffic to trucks, the Interstate Commerce Commission (ICC) canceled the proposed tariffs. The District Court set aside and annulled the ICC's order for want of substantial evidence to support it, viewing the shippers' evidence as mere conjecture and self-serving and finding that instead of losing revenue from the new tariffs the railroads would improve their financial position notwithstanding any predicted traffic diversion. *Held:* The District Court exceeded its function in reweighing the testimony, and on the record before it erred in differing with the ICC and agreeing with the railroads on the impact of the new tariffs on railroad revenue.

397 F. Supp. 607, reversed.

PER CURIAM.

This is an appeal from the judgment of a three-judge District Court setting aside and annulling a decision and order of the Interstate Commerce Commission. *Louisville & Nashville R. Co.* v. *United States,* 397 F. Supp. 607 (WD Ky. 1975).

In 1973, the railroads in southern territory, which lies south of the Ohio River and east of the Mississippi, proposed new tariffs changing the method of calculating the through rates on vegetable oil, cake or meal, and related articles, which were subject to transit privileges at various points where animal, fish, and poultry feed using these ingredients was made and transshipped. Certain

large feed manufacturers protested. The Commission found that the net effect of the new tariffs would be to increase the through rates on the articles involved and that the railroads had "not presented probative evidence in justification" of the new tariffs. Based on the testimony and evidence presented by the protestants, the Commission found "strong support on this record for concluding that these shippers will divert a considerable portion of their feed traffic, from railroad to trucks, with the establishment of the proposed rule." The result, the Commission found, would be "a net loss of revenue to the [railroads] despite the assessment of the higher rates and charges and thus will be self-defeating." The Commission concluded that the railroads had not met their burden of proof that the proposed tariffs were just and reasonable under § 15 of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U. S. C. § 15 (7), and required that the railroads cancel the schedule. 346 I. C. C. 579, 587–588 (1973).

The District Court set aside and annulled the Commission order for want of substantial evidence to support it. The District Court considered the shippers' evidence mere conjecture and self-serving and could not accept the Commission's conclusion that the railroads would lose revenue from the new tariffs. It also thought it "uncontroverted" that "the railroads have incurred a loss of revenue from the transportation of meal," and therefore "clearly established that if there should be a diversion of meal traffic as predicted by the shippers, the carriers would actually be in a better financial position than at present." 397 F. Supp., at 610.

We reverse the judgment of the District Court. Concededly, there was detailed evidence with respect to the anticipated traffic diversion which the Commission credited and thought strongly supported its conclusion. The District Court exceeded its function in reweighing the

testimony, which is primarily the task of the Commission. *Alton R. Co.* v. *United States*, 315 U. S. 15, 23–24 (1942); *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U. S. 57, 69 (1966). On the record before it, the District Court also erred in differing with the Commission and agreeing with the railroads with respect to the impact of the new tariffs on railroad revenue. The court relied on evidence which showed only that under the old rates the railroads sustained a loss on *feed* outbound from the transit points and which, as a railroad witness testified, Comm'n Tr. 28–29, did not relate to the net gain or loss on inbound *meal* shipments or on the through movement when both legs were considered together.

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

Per Curiam

MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* LUDWIG, ADMINISTRATOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75–1504. Decided June 14, 1976

In a diversity action by respondent administrator against petitioner insurer for recovery under the double indemnity provision of a life insurance policy issued in Michigan to respondent's decedent, who was killed in Illinois, the District Court ruled that under Illinois conflict-of-laws rules Michigan substantive law applied and that under that law petitioner was liable only for ordinary benefits. On respondent's appeal the Court of Appeals reversed the judgment that under Michigan law petitioner was liable only for ordinary benefits and also held that petitioner's failure to cross-appeal precluded it from arguing that Illinois law applied, under which it would also be liable only for ordinary benefits. *Held:* The Court of Appeals erred because petitioner's argument was no more than "an attack on the reasoning of the lower court," and as such required no cross-appeal. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435.

Certiorari granted; 524 F. 2d 376, vacated and remanded.

PER CURIAM.

This is a diversity case. Petitioner (the insurer) issued a life insurance policy in Michigan to Dean E. Cane providing for double indemnity if Cane's "death was the result of an injury sustained while the insured was a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire . . . ." Cane was killed in Illinois by a freight train while crossing a railroad track in order to board a commuter train which had not yet arrived at the station. The insurer paid Cane's estate ordinary benefits, but denied liability under the double indemnity provision of the policy.

The administrator of Cane's estate (respondent) sued the insurer in the District Court for the Northern District of Illinois to recover benefits under the double indemnity provision. The District Court held that under Illinois conflict-of-laws rules, the law of the situs of the contract (Michigan) applied, and that under Michigan law the insurer was liable only for ordinary benefits. The administrator appealed. The insurer argued in the Court of Appeals for the Seventh Circuit that the District Court's application and interpretation of Michigan law was correct, and alternatively that Illinois conflict-of-laws rules required application of Illinois—not Michigan—substantive law in this case, and that under Illinois substantive law its liability was also only for ordinary benefits. The Court of Appeals reversed, 524 F. 2d 376 (1975), but without reaching the question of which State's substantive law would be applicable under the Illinois conflicts rule. The court held that the insurer was precluded from arguing on appeal the applicability of Illinois substantive law, because it had not cross-appealed from the District Court's ruling that Michigan law applied. *Id.*, at 379 n. 1.

The Court of Appeals' decision on this issue is plainly at odds with the "inveterate and certain" rule, *Morley Co.* v. *Maryland Cas. Co.*, 300 U. S. 185, 191 (1937), of *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924), where a unanimous Court said:

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the

> decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." (Footnote omitted.)

The argument of the insurer before the Court of Appeals that Illinois, not Michigan, substantive law applied was no more than "an attack upon the reasoning of the lower court," and as such required no cross-appeal.

Because the Court of Appeals did "not reach the issue nor express any opinion on the effect of the tort claim conflicts of law doctrine" of Illinois, 524 F. 2d, at 379 n. 1, we think it "appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge* v. *Williams,* 397 U. S. 471, 476 n. 6 (1970). Accordingly, the petition for writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 ET AL. *v.* HORTONVILLE EDUCATION ASSN. ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 74–1606. Argued February 23–24, 1976—Decided June 17, 1976

After negotiations for renewal of a collective-bargaining contract between respondent teachers and petitioner Wisconsin School Board failed to produce agreement, the teachers went on strike in direct violation of Wisconsin law. The Board thereafter conducted individual disciplinary hearings. Through counsel, the striking teachers advised that they wished to be treated as a group, and contended that the Board was not sufficiently impartial properly to discipline them. The Board terminated the striking teachers' employment, whereupon respondent teachers brought this suit, contending, *inter alia,* that the hearing was inadequate to meet due process requirements. The state trial court granted the Board's motion for summary judgment. The Wisconsin Supreme Court reversed, holding that the procedure followed by the Board had violated federal due process requirements since an impartial decisionmaker was required to resolve the controversy and the Board was not sufficiently impartial. Since state law afforded no adequate remedy, the court provided that after the Board's notice to fire a teacher and a hearing, a teacher dissatisfied with the Board's decision could secure a *de novo* hearing from a county court of record on *all* issues. *Held:* The Due Process Clause of the Fourteenth Amendment did not guarantee respondent teachers that the decision to terminate their employment would be made or reviewed by a body other than the School Board. *Morrissey* v. *Brewer,* 408 U. S. 471, distinguished. Pp. 489–497.

(a) The record does not support respondents' contention that the Board members had a personal or official stake in the dismissal decision sufficient to disqualify them. Pp. 491–492.

(b) Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decisionmaker, *Withrow* v. *Larkin,* 421 U. S. 35, 47; *FTC* v. *Cement Institute,* 333 U. S. 683, 700–703, and here the School Board's participation pursuant to its statutory duty in the

collective-bargaining negotiations was not a disqualifying factor. Pp. 492–494.

(c) The School Board, in whom the State has vested the policy-making function, is the body with the overall responsibility for governing the school district, and its members are accountable to the voters for how they discharge their statutory duties, one of which is to employ and dismiss teachers. Permitting the Board to make the policy decision at issue here preserves its control over school district affairs, leaving the balance of power over this aspect of labor relations where the state legislature has placed it. Pp. 495–496.

66 Wis. 2d 469, 225 N. W. 2d 658, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 497.

Jack D. Walker argued the cause for petitioners. With him on the briefs were *James K. Ruhly* and *Joseph A. Melli.*

Robert H. Friebert argued the cause for respondents. With him on the brief was *Thomas W. St. John.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether School Board members, vested by state law with the

*Briefs of *amici curiae* urging reversal were filed by *James F. Clark* and *Karen A. Mercer* for the Wisconsin Association of School Boards, Inc.; by *Leon Fieldman* for the National School Boards Assn.; by *Robert T. Thompson, Lawrence Kraus,* and *Richard B. Berman* for the Chamber of Commerce of the United States; and by *Jerome T. Foerster* for the Pennsylvania School Boards Assn.

Michael H. Gottesman, Robert M. Weinberg, and *David Rubin* filed a brief for the National Education Assn. as *amicus curiae* urging affirmance.

John E. Murray filed a brief for the County of Broome, State of New York, as *amicus curiae.*

power to employ and dismiss teachers, could, consistent with the Due Process Clause of the Fourteenth Amendment, dismiss teachers engaged in a strike prohibited by state law.

I

The petitioners are a Wisconsin school district, the seven members of its School Board, and three administrative employees of the district. Respondents are teachers suing on behalf of all teachers in the district and the Hortonville Education Association (HEA), the collective-bargaining agent for the district's teachers.

During the 1972–1973 school year Hortonville teachers worked under a master collective-bargaining agreement; negotiations were conducted for renewal of the contract, but no agreement was reached for the 1973–1974 school year. The teachers continued to work while negotiations proceeded during the year without reaching agreement. On March 18, 1974, the members of the teachers' union went on strike, in direct violation of Wisconsin law. On March 20, the district superintendent sent all teachers a letter inviting them to return to work; a few did so. On March 23, he sent another letter, asking the 86 teachers still on strike to return, and reminding them that strikes by public employees were illegal; none of these teachers returned to work. After conducting classes with substitute teachers on March 26 and 27, the Board decided to conduct disciplinary hearings for each of the teachers on strike. Individual notices were sent to each teacher setting hearings for April 1, 2, and 3.

On April 1, most of the striking teachers appeared before the Board with counsel. Their attorney indicated that the teachers did not want individual hearings, but preferred to be treated as a group. Although counsel agreed that the teachers were on strike, he raised several procedural objections to the hearings. He

also argued that the Board was not sufficiently impartial to exercise discipline over the striking teachers and that the Due Process Clause of the Fourteenth Amendment required an independent, unbiased decisionmaker. An offer of proof was tendered to demonstrate that the strike had been provoked by the Board's failure to meet teachers' demands, and respondents' counsel asked to cross-examine Board members individually. The Board rejected the request, but permitted counsel to make the offer of proof, aimed at showing that the Board's contract offers were unsatisfactory, that the Board used coercive and illegal bargaining tactics, and that teachers in the district had been locked out by the Board.

On April 2, the Board voted to terminate the employment of striking teachers, and advised them by letter to that effect. However, the same letter invited all teachers on strike to reapply for teaching positions. One teacher accepted the invitation and returned to work; the Board hired replacements to fill the remaining positions.

Respondents then filed suit against petitioners in state court, alleging, among other things, that the notice and hearing provided them by the Board were inadequate to comply with due process requirements. The trial court granted the Board's motion for summary judgment on the due process claim. The court found that the teachers, although on strike, were still employees of the Board under Wisconsin law and that they retained a property interest in their positions under this Court's decisions in *Perry* v. *Sindermann,* 408 U. S. 593 (1972), and *Board of Regents* v. *Roth,* 408 U. S. 564 (1972). The court concluded that the only question before the Board on April 1 and 2 was whether the teachers were on strike in violation of state law, and that no evidence in mitigation was relevant. It rejected their claim that they were denied due process, since the teachers admitted they were on strike after receiving adequate notice and a hearing,

including the warning that they were in violation of Wisconsin law.

On appeal, the Wisconsin Supreme Court reversed, 66 Wis. 2d 469, 225 N. W. 2d 658 (1975). On the single issue now presented it held that the Due Process Clause of the Fourteenth Amendment to the Federal Constitution required that the teachers' conduct and the Board's response be evaluated by an impartial decisionmaker other than the Board. The rationale of the Wisconsin Supreme Court appears to be that although the teachers had admitted being on strike, and although the strike violated Wisconsin law, the Board had available other remedies than dismissal, including an injunction prohibiting the strike, a call for mediation, or continued bargaining. Relying on our holding in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), the Wisconsin court then held "it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decision maker be charged with the responsibility of determining what action shall be taken on the basis of those facts." 66 Wis. 2d, at 493, 225 N. W. 2d, at 671. The court held that the Board was not sufficiently impartial to make this choice: "The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board." *Ibid.* In reaching its conclusion, the court acknowledged that the Board's decision could be reviewed in other forums; but no reviewing body would give the teachers an opportunity to demonstrate that "another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decision maker." *Id.*, at 496, 225 N. W. 2d, at 672.

Since it concluded that state law provided no adequate remedy, the Wisconsin Supreme Court fashioned one it thought necessary to comply with federal due process

principles. To leave with the Board "[a]s much control as possible . . . to set policy and manage the school," the court held that the Board should after notice and hearing make the decision to fire in the first instance. A teacher dissatisfied with the Board's decision could petition any court of record in the county for a *de novo* hearing on *all* issues; the trial court would "resolve any factual disputes and provide for a reasonable disposition." *Id.*, at 498, 225 N. W. 2d, at 673. The Wisconsin Supreme Court recognized that this remedy was "not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body." *Ibid.* But it would suffice "until such time and only until such time as the legislature provides a means to establish a forum that will meet the requirements of due process." *Ibid.*

We granted certiorari because of the state court's reliance on federal due process. 423 U. S. 821 (1975). We reverse.

II

The Hortonville School District is a common school district under Wisconsin law, financed by local property taxes and state school aid and governed by an elected seven-member School Board. Wis. Stat. Ann. §§ 120.01, 120.03, 120.06 (1973). The Board has broad power over "the possession, care, control and management of the property and affairs of the school district." § 120.12 (1); see also §§ 120.08, 120.10, 120.15–120.17. The Board negotiates terms of employment with teachers under the Wisconsin Municipal Employment Relations Act, § 111.70 *et seq.* (1974), and contracts with individual teachers on behalf of the district. The Board is the only body vested by statute with the power to employ and dismiss teachers. § 118.22 (2).[1]

[1] The National School Boards Association informs us that 45 States

The sole issue in this case is whether the Due Process Clause of the Fourteenth Amendment prohibits this School Board from making the decision to dismiss teachers admittedly engaged in a strike and persistently refusing to return to their duties.[2] The Wisconsin Supreme Court held that state law prohibited the strike and that termination of the striking teachers' employment was within the Board's statutory authority. 66 Wis. 2d, at 479–481, 225 N. W. 2d, at 663–665. We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the State. *Groppi* v. *Wisconsin*, 400 U. S. 505, 507 (1971); *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 688 (1959). The only decision remaining for the Board therefore involved the exercise of its discretion as to what should be done to carry out the duties the law placed on the Board.

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lodge the power to dismiss teachers in local school boards. Brief as *Amicus Curiae* 9 n. 4.

[2] The Wisconsin Supreme Court held that the discharge of the teachers during their 1973–1974 individual contracts, and the revocation of the Board's individual offers of employment for the 1974–1975 school year, deprived them of property. 66 Wis. 2d 469, 489, 225 N. W. 2d 658, 669 (1975). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). We do not challenge the Wisconsin Supreme Court's conclusion that state law gave these teachers a "legitimate claim of entitlement to job tenure." *Perry* v. *Sindermann*, 408 U. S. 593, 602 (1972).

We are not required to determine whether the notice and hearing afforded by the Board, as matters separate from the Board's ability fairly to decide the issue before it, were adequate to afford respondents due process. Respondents do not suggest here that the notice they received was constitutionally inadequate, and they refused to treat the dismissals on a case-by-case basis.

A

Respondents argue, and the Wisconsin Supreme Court held, that the choice presented for the Board's decision is analogous to that involved in revocation of parole in *Morrissey* v. *Brewer, supra,* that the decision could be made only by an impartial decisionmaker, and that the Board was not impartial. In *Morrissey* the Court considered a challenge to state procedures employed in revoking the parole of state prisoners. There we noted that the parole revocation decision involved two steps: First, an inquiry whether the parolee had in fact violated the conditions of his parole; second, determining whether the violations found were serious enough to justify revocation of parole and the consequent deprivation of the parolee's conditional liberty. With respect to the second step, the Court observed:

> "The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary." 408 U. S., at 480.

Nothing in this case is analogous to the first step in *Morrissey,* since the teachers admitted to being on strike. But respondents argue that the School Board's decision in this case is, for constitutional purposes, the same as the second aspect of the decision to revoke parole. The Board cannot make a "reasonable" decision on this issue, the Wisconsin Supreme Court held and respondents ar-

gue, because its members are biased in some fashion that the due process guarantees of the Fourteenth Amendment prohibit.[3]

Morrissey arose in a materially different context. We recognized there that a parole violation could occur at a place distant from where the parole revocation decision would finally be made; we also recognized the risk of factual error, such as misidentification. To minimize this risk, we held: "[D]ue process requires that after the

[3] Respondents argue that the requirement that the Board's decision be "reasonable" is in fact a requirement of state law. From that premise and from the premise that the "reasonableness" determination requires an evaluation of the Board's negotiating stance, they argue that nothing but decision and review *de novo* by an "uninvolved" party will secure their right to a "reasonable" decision. See *Withrow* v. *Larkin*, 421 U. S. 35, 58–59, n. 25 (1975). It is clear, however, that the Wisconsin Supreme Court held that the Board's decision must be "reasonable," not by virtue of state law, but because of its reading of the Due Process Clause of the Fourteenth Amendment. First, the Wisconsin court relied largely upon cases interpreting the Federal Constitution in this aspect of its holding. See 66 Wis. 2d, at 493, 225 N. W. 2d, at 671. Second, the only state case the Wisconsin Supreme Court cited for more than a general statement of federal requirements was *Durkin* v. *Board of Police & Fire Comm'rs*, 48 Wis. 2d 112, 180 N. W. 2d 1 (1970). There the Wisconsin Supreme Court interpreted a state statute that gave firemen and policemen the right to appeal a decision of the Board of Police and Fire Commissioners to a state court; the statute expressly provided that the court was to determine whether "upon the evidence the order of the Board was reasonable." *Id.*, at 117, 180 N. W. 2d, at 3. See Wis. Stat. Ann. § 62.13 (5)(h) (1957). There is no comparable statutory provision giving teachers the right to review this standard. Finally, to impose a "reasonableness" requirement, or any other test that looks to evaluation by another entity, makes semantic sense only where review is contemplated by the statute. Review, and the standard for review, are concepts that go hand in hand. The Wisconsin Supreme Court concluded both that review of the Board's decision was necessary and that a "reasonableness" standard was appropriate as a result of its reading of the Due Process Clause of the Fourteenth Amendment.

arrest [for parole violation], the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." *Id.*, at 485. But this holding must be read against our earlier discussion in *Morrissey* of the parole officer's role as counselor for and confidant of the parolee; it is this same officer who, on the basis of preliminary information, decides to arrest the parolee. A school board is not to be equated with the parole officer as an arresting officer; the school board is more like the parole board, for it has ultimate plenary authority to make its decisions derived from the state legislature. General language about due process in a holding concerning revocation of parole is not a reliable basis for dealing with the School Board's power as an employer to dismiss teachers for cause. We must focus more clearly on, first, the nature of the bias respondents attribute to the Board, and, second, the nature of the interests at stake in this case.

B

Respondents' argument rests in part on doctrines that have no application to this case. They seem to argue that the Board members had some personal or official stake in the decision whether the teachers should be dismissed, comparable to the stake the Court saw in *Tumey* v. *Ohio*, 273 U. S. 510 (1927), or *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972); see also *Gibson* v. *Berryhill*, 411 U. S. 564 (1973), and that the Board has manifested some personal bitterness toward the teachers, aroused by teacher criticism of the Board during the strike, see, *e. g.*, *Taylor* v. *Hayes*, 418 U. S. 488 (1974); *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971). Even assuming that those cases state the governing standards when the decisionmaker is a public employer dealing with employees, the teachers did not show, and the Wisconsin courts did not find, that the Board mem-

bers had the kind of personal or financial stake in the decision that might create a conflict of interest, and there is nothing in the record to support charges of personal animosity. The Wisconsin Supreme Court was careful "not to suggest . . . that the board members were anything but dedicated public servants, trying to provide the district with quality education . . . within its limited budget." 66 Wis. 2d, at 494, 225 N. W. 2d, at 671. That court's analysis would seem to be confirmed by the Board's repeated invitations for striking teachers to return to work, the final invitation being contained in the letter that notified them of their discharge.[4]

The only other factor suggested to support the claim of bias is that the School Board was involved in the negotiations that preceded and precipitated the striking teachers' discharge. Participation in those negotiations was a statutory duty of the Board. The Wisconsin Supreme Court held that this involvement, without more,

[4] Respondents alleged before the Board, and argue here, that the Board's decision to dismiss them was motivated by antiunion animus in addition to personal vindictiveness, and that their illegal strike should be excused because the Board provoked it. The Wisconsin Supreme Court suggested that the Board's "decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop." 66 Wis. 2d, at 494, 225 N. W. 2d, at 671. Given that Wisconsin statutes permitted the Board to dismiss striking teachers, and assuming, as did the Wisconsin court, that the Board's decision was in other respects proper under state labor law, we do not agree that federal due process prevented the Board from pursuing a course of action that was within its explicit statutory authority and which, in its judgment, would serve the best interests of the school system. That the result may also have been desirable for other reasons is irrelevant to the due process issue on which the Wisconsin Supreme Court's decision turned, and if the other reasons are invalid under state law, respondents can resort to whatever forum the State provides.

disqualified the Board from deciding whether the teachers should be dismissed:

> "The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. . . . They were . . . not uninvolved in the events which precipitated decisions they were required to make." *Id.*, at 493–494, 225 N. W. 2d, at 671.

Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975); *FTC* v. *Cement Institute*, 333 U. S. 683, 700–703 (1948). Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." *United States* v. *Morgan*, 313 U. S. 409, 421 (1941); see also *FTC* v. *Cement Institute, supra*, at 701.

Respondents' claim and the Wisconsin Supreme Court's holding reduce to the argument that the Board was biased because it negotiated with the teachers on behalf of the school district without reaching agreement and learned about the reasons for the strike in the course of negotiating. From those premises the Wisconsin court concluded that the Board lost its statutory power to determine that the strike and persistent refusal to terminate it amounted to conduct serious enough to warrant discharge of the strikers. Wisconsin statutes

vest in the Board the power to discharge its employees, a power of every employer, whether it has negotiated with the employees before discharge or not. The Fourteenth Amendment permits a court to strip the Board of the otherwise unremarkable power the Wisconsin Legislature has given it only if the Board's prior involvement in negotiating with the teachers means that it cannot act consistently with due process.

C

Due process, as this Court has repeatedly held, is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it. See *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Arnett* v. *Kennedy*, 416 U. S. 134, 168 (1974) (POWELL, J., concurring); *id.*, at 188 (WHITE, J., concurring and dissenting); *Goldberg* v. *Kelly*, 397 U. S. 254, 263–266 (1970). Our assessment of the interests of the parties in this case leads to the conclusion that this is a very different case from *Morrissey* v. *Brewer*, and that the Board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law be discharged.

The teachers' interest in these proceedings is, of course, self-evident. They wished to avoid termination of their employment, obviously an important interest, but one that must be examined in light of several factors. Since the teachers admitted that they were engaged in a work stoppage, there was no possibility of an erroneous factual determination on this critical threshold issue. Moreover,

what the teachers claim as a property right was the expectation that the jobs they had left to go and remain on strike in violation of law would remain open to them. The Wisconsin court accepted at least the essence of that claim in defining the property right under state law, and we do not quarrel with its conclusion. But even if the property interest claimed here is to be compared with the liberty interest at stake in *Morrissey*, we note that both "the risk of an erroneous deprivation" and "the degree of potential deprivation" differ in a qualitative sense and in degree from those in *Morrissey*. *Mathews* v. *Eldridge*, *supra*, at 341.

The governmental interests at stake in this case also differ significantly from the interests at stake in *Morrissey*. The Board's decision whether to dismiss striking teachers involves broad considerations, and does not in the main turn on the Board's view of the "seriousness" of the teachers' conduct or the factors they urge mitigated their violation of state law. It was not an adjudicative decision, for the Board had an obligation to make a decision based on its own answer to an important question of policy: What choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it? The Board's decision was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well. See Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L. J. 1156 (1974).

State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-

to-day problems of a modern public school system including the severe consequences of a teachers' strike; by virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform. Second, the state legislature has given to the Board the power to employ and dismiss teachers, as a part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.[5]

III

Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A

[5] Respondents argue that the School Board is free to defend its action in the *de novo* hearing authorized by the Wisconsin Supreme Court by attempting to demonstrate that policy considerations dictated its decision to dismiss the striking teachers. Policymaking is a process of prudential judgment, and we are not prepared to say that a judge can generally make a better policy judgment or, in this case, as good a judgment as the School Board, which is intimately familiar with all the needs of the school district, or that a school board must, at the risk of suspending school operations, wend its way through judicial processes not mandated by the legislature. More important, no matter what arguments the Board may make to the *de novo* trial judge, as we noted earlier it will be the School Board that will have to cope with the consequences of the decision and be responsible to the electorate for it. The privilege of oral argument to a judge is no substitute for the power to employ and dismiss vested by statute exclusively in the Board.

showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power. Cf. *Withrow* v. *Larkin*, 421 U. S., at 47. Accordingly, we hold that the Due Process Clause of the Fourteenth Amendment did not guarantee respondents that the decision to terminate their employment would be made or reviewed by a body other than the School Board.

The judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The issue in this case is whether the discharge of the respondent teachers by the petitioner School Board violated the Due Process Clause of the Fourteenth Amendment because the Board members were not impartial decisionmakers. It is now well established that "a biased decisionmaker [is] constitutionally unacceptable [and] 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow* v. *Larkin*, 421 U. S. 35, 47, quoting *In re Murchison*, 349 U. S. 133, 136.

In order to ascertain whether there is a constitutionally unacceptable danger of partiality, both the nature of the particular decision and the interest of the decisionmaker in its outcome must be examined. Here, Wisconsin law controls the factors that must be found before a teacher may be discharged for striking. The parties present sharply divergent views of what the Wisconsin law requires. The petitioners claim that the decision to

discharge a striking teacher is a policy matter entrusted to the discretion of the local school board, whereas the respondents contend that a striking teacher cannot be discharged unless that sanction is reasonable in view of the circumstances culminating in the strike.

The Court acknowledges, as it must, that it is "bound to accept the interpretation of Wisconsin law by the highest court of the State." *Ante*, at 488. Yet it then proceeds to reverse that court by assuming, as the petitioners urge, that under Wisconsin law the determination to discharge the striking teachers only "involved the [Board's] exercise of its discretion as to what should be done to carry out the duties the law placed on the Board." *Ibid.* It dismisses the respondents' version of Wisconsin law in a footnote. *Ante*, at 490 n. 3.

But the fact is that the Wisconsin Supreme Court has not clearly delineated the state-law criterion that governs the discharge of striking teachers, and this Court is wholly without power to resolve that issue of state law. I would therefore remand this case to the Wisconsin Supreme Court for it to determine whether, on the one hand, the School Board is charged with considering the reasonableness of the strike in light of its own actions, or is, on the other, wholly free, as the Court today assumes, to exercise its discretion in deciding whether to discharge the teachers.

Under the petitioners' view of the Wisconsin law, the discharge determination is purely a policy judgment involving an assessment of the best interest of the school system. Since that judgment does not require the Board to assess its own conduct during the negotiations, and since there is no indication that the Board members have a financial or personal interest in its outcome, the only basis for a claim of partiality rests on the Board's knowledge of the events leading to the strike acquired through its participation in the negotiation process. As

the Court notes, however, "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker." *Ante*, at 493.

But a distinctly different constitutional claim is presented if, as the respondents contend, the School Board members must evaluate their own conduct in determining whether dismissal is a reasonable sanction to impose on the striking teachers. Last Term in *Withrow* v. *Larkin*, *supra*, the Court noted that "[a]llowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present" where the bias issue rests exclusively on familiarity with the facts of a case. 421 U. S., at 58 n. 25. Apart from considerations of financial interest or personal hostility, the Court has found that officials "directly involved in making recommendations cannot always have complete objectivity in evaluating them." *Morrissey* v. *Brewer*, 408 U. S. 471, 486. See *Goldberg* v. *Kelly*, 397 U. S. 254.

"[U]nder a realistic appraisal of psychological tendencies and human weakness," *Withrow* v. *Larkin*, *supra*, at 47, I believe that there is a constitutionally unacceptable danger of bias where school board members are required to assess the reasonableness of their own actions during heated contract negotiations that have culminated in a teachers' strike. If, therefore, the respondents' interpretation of the state law is correct, then I would agree with the Wisconsin Supreme Court that "the board was not an impartial decision maker in a constitutional sense and that the [teachers] were denied due process of law." 66 Wis. 2d 469, 494, 225 N. W. 2d 658, 671.

For the reasons stated, I would vacate the judgment before us and remand this case to the Supreme Court of Wisconsin.

UNITED STATES ET AL. *v.* CHESAPEAKE & OHIO RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 75–420. Argued April 26–27, 1976—Decided June 17, 1976

In April 1974, virtually all the Nation's railroads, including appellees, the Chessie System, filed with the Interstate Commerce Commission (ICC) a joint petition for a general revenue increase, stating as a reason therefor that "billions of dollars are needed immediately and in the coming decade for maintenance and improvement of the Nation's rail transportation plant." Though the ICC on June 3, 1974, suspended the operation of the new schedules, it authorized the railroads to file new tariffs subject to conditions that would assure that the additional revenue would be expended for "delayed capital improvements" and "deferred maintenance" of plant and equipment, defining those terms in a subsequent order, which also permitted up to 3% of the revenue derived from the increase to be applied to higher nonfuel material and supply costs. Thereafter, appellees, alleging that they had no "deferred maintenance" or "delayed capital improvements" that would qualify under the ICC's definitions; that they were precluded from applying the additional revenues to earlier commitments; and that they were placed at a competitive disadvantage with railroads that could meet the ICC's conditions, sought reconsideration from the ICC. Dissatisfied with the ICC's response, appellees brought this suit attacking the lawfulness of the conditions imposed and seeking to have the ICC's orders set aside. The District Court issued an injunction prohibiting the ICC from enforcing against appellees those portions of the challenged orders that required revenues to be spent for specified purposes, concluding that "Congress has not authorized the [ICC] to control a carrier's expenditure of funds as a condition to withholding the suspension of rates." *Held:* The ICC may, as a condition for not suspending and subsequently investigating the lawfulness of a proposed tariff, require the railroads to devote the additional revenues for the purposes the carriers invoked in support of the increase. Pp. 509–515.

(a) Imposition of the condition precedent to the immediate

implementation of the rate increase was directly related to the ICC's statutory mandate to assess the reasonableness of the rates and to suspend them if there was a question as to their legality. Instead of suspending the proposed rates for the seven-month statutory period, as it could have done, the ICC offered an alternative more precisely tailored to the particular circumstances presented. P. 514.

(b) Since the District Court held that the ICC did not have the power to impose conditions on the refiling of the tariff, it did not consider appellees' contention that their inability to use the new revenues makes the ICC's action arbitrary and capricious as to them, and that question may, if appellees choose, be raised on remand. P. 515.

392 F. Supp. 358, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 521. POWELL, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Friedman argued the cause for the United States et al. On the briefs were *Solicitor General Bork, Assistant Attorney General Kauper, Carl D. Lawson, Fritz R. Kahn, Betty Jo Christian, Hanford O'Hara,* and *Arthur J. Cerra.*

Doyle S. Morris argued the cause for appellees. With him on the briefs were *Owen Clarke, Charles C. Rettberg, Jr., George D. Gibson,* and *E. Milton Farley III.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case is here on direct appeal, pursuant to 28 U. S. C. §§ 1253,[1] 2325, from an order of the District Court which permanently enjoined the Interstate Com-

[1] For cases filed after March 1, 1975, review of Interstate Commerce Commission orders is in the court of appeals with further

merce Commission from enforcing, against the appellee railway system,[2] an order requiring the application of increased revenues to deferred capital improvements and deferred maintenance as a condition for the nonsuspension of the rate increases. 392 F. Supp. 358 (ED Va. 1975).

In April 1974, the Nation's railroads,[3] including the appellees, filed with the Interstate Commerce Commission a joint petition for a general revenue increase "with respect to the revenue needs of all carriers by railroad operating in the United States." App. 97. *Ex parte No. 305,* Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974. The proposed tariffs included a 10% increase in the level of freight rates. In their petition, the railroads alleged in part:

> "The railroad industry is capital-intensive and must generate huge amounts of capital annually just to replace stationary facilities and equipment as it becomes worn out or obsolete. When earnings are inadequate to support this level of spending, as now, then a process of asset liquidation occurs accelerating as facilities and equipment are consumed by increased traffic. Even if the liquidation of assets is arrested by earnings sufficient to support maintenance and replacement there is a further need to modernize and expand capacity if the railroads are to be able to meet sharply increasing demands

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review possible by petition for writ of certiorari to this Court. Pub. L. 93–584, 88 Stat. 1917. The present case was filed prior to March 1, 1975.

[2] Appellees are the Chesapeake and Ohio Railway Co., the Baltimore and Ohio Railroad Co., and the Western Maryland Railway. These railroads are known as the Chessie System and will be referred to as such or as Chessie throughout this opinion.

[3] Except the Long Island Railroad.

> upon them for economic and efficient transportation. There is presently an abundance of data and analysis which reliably establishes that billions of dollars are needed immediately and in the coming decade for maintenance and improvement of the Nation's rail transportation plant." App. 107.

On June 3, 1974, the Commission entered an order which noted "that the nation's railroads are in need of additional freight revenues to offset recently incurred costs of materials, other than fuel, and to provide an improved level of earnings . . . ." Jurisdictional Statement 42a. The Commission found that the Nation's railroads were "in danger of further deterioration detrimental to the public interest . . . ," *ibid.*, and recognized that "without the additional revenues to be derived from increased freight rates and charges, the earnings of the nation's railroads would be insufficient to enable them under honest, economical and efficient management to provide adequate and efficient railroad transportation services . . . ." *Ibid.* The Commission concluded that "the increases proposed would, if permitted to become effective, generate additional revenues sufficient to enable the carriers to prevent further deterioration and improve service." At the same time, it noted that "if the schedules were permitted to become effective as filed and without conditions designed to promote service improvements, the increases proposed would be unjust and unreasonable and contrary to the dictates of the national transportation policy . . . ." *Id.*, at 42a–43a. The Commission, therefore, suspended the operation of the new schedules, but authorized the railroads to file new tariffs, subject to conditions providing that revenues generated by the increases "should be expended for capital improvements and deferred maintenance of plant and equipment and the amount needed for in-

creased material and supply cost, other than fuel." *Id.*, at 46a.[4]

On July 18, 1974, the Commission entered the second pertinent order in this case. This order defined "deferred maintenance" [5] and "delayed capital improvements." [6]

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[4] The Commission elaborated:

"The Commission has previously expressed its dissatisfaction with the evidence introduced by the respondents in general revenue proceedings. In the subject proceeding, the evidence introduced by the railroads is far from satisfactory, especially, for example, the respondents' failure to identify and quantify the costs of deferred maintenance." Jurisdictional Statement 47a.

". . . Accordingly, as previously indicated, the Commission intends that revenues generated by increases authorized herein, over and above the amount needed for increased material and supply costs, other than fuel, will be used by the respondents exclusively for reducing deferred maintenance of plant and equipment and delayed capital improvements in order that rail *service* to the shippers will be improved. The Commission expects that the authorized increases will enable the respondents to expend substantially more for maintenance and capital improvements than in recent years and will evaluate respondents' compliance with this directive. Respondents' failure to apply the increased revenues as heretofore specified will result in the cancellation of these authorized increases." *Id.*, at 48a. (Emphasis in original.)

[5] "[T]he accrued deterioration or deficiency in the physical operating condition of railroad track structures, cars and locomotives, and other property used in the provision of transportation service resulting from the failure and/or inability to properly maintain plant and equipment, which produces an adverse effect on railroad operations to an extent that services to shippers have been rendered partially or wholly inadequate and/or has resulted in diminishing the railroads' competitive ability . . . ." *Id.*, at 56a.

[6] "[A]ctually planned, specifically identified capital improvements necessary for the provision of adequate or improved transportation service to shippers and which had not been undertaken, scheduled, or otherwise committed because funding . . . was not, or projected to be, available through June 30, 1975. They exclude improvements in progress and those scheduled or otherwise committed and recognized in capital budgets in effect are applicable

The order also provided that "up to 3 percentage points of the 10-percent authorization may be applied to increased material and supply costs, excluding fuel, provided such costs have been incurred." *Id.*, at 59a. The order also permitted increased income taxes to be excluded in determining the balance of funds to be applied to deferred maintenance and delayed capital improvements.

On July 30, appellee Chessie System sought reconsideration of the Commission's order of July 18 "for the reason that under the Commission's definitions of deferred maintenance and delayed capital improvements they will be unable to apply any of the increased revenues derived from the Ex parte No. 305 proceeding (other than those earmarked for increased material and supply costs) to any projects now scheduled or which may be scheduled in the foreseeable future." App. 222. Chessie alleged it had no such "deferred maintenance" or "delayed capital improvements":

> *"No worthwhile project on Chessie System designed to improve its transportation service to the shipping public has ever been deferred because financing or funding was not available. None will be as long as Chessie System earnings are at levels adequate enough to attract capital. Chessie System has never stinted in its expenditures to provide adequate and efficient transportation service to its customers."* (Emphasis in original.) *Id.*, at 223.

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on June 1, 1974. These capital improvements are further identified as delayed expenditures which would (1) add to or improve the carriers' plant and/or equipment so as to increase its usefulness, capacity, durability and efficiency, and (2) which are capitalizable in the property accounts in accordance with the Commission's accounting regulations . . . ." *Ibid.*

Chessie further noted that it had made significant expenditures for capital improvements in the six months prior to the Commission order. It pointed out that these projects did not qualify under the Commission's definition because the funds had been committed before June 1, 1974, and the projects "had not been deferred because funding or financing was not available." *Id.*, at 224. Unless it was permitted to apply these additional revenues to these earlier commitments, contended Chessie, "[t]hey will simply lie dormant in a sterile, segregated account which will result in several serious consequences both to Chessie System and the shipping public." *Id.*, at 225. Basically, argued Chessie, the consequence of the order was to place Chessie "at a distinct competitive disadvantage vis-à-vis other railroads, which for one reason or another have deferred maintenance or delayed capital improvements within the meaning of the Commission's order. These lines will be able to use the additional revenues to buy cars and other equipment while Chessie System's money will lie fallow. In effect, the order penalizes Chessie System and other efficient carriers and rewards only those railroads which are inefficient." *Ibid.* Chessie specifically asked the Commission to permit the expenditure of funds generated by the increases for any valid corporate purpose if the railroad had no deferred maintenance or deferred capital improvements as defined by the Commission's order. Chessie, for the first time, also argued that the Commission, "exceeded its statutory authority by conditioning the use to which the revenues derived from Ex parte No. 305 might be applied." *Id.*, at 226.

By order dated August 9, 1974, the Commission denied the petition for reconsideration but did significantly clarify its earlier orders. While reiterating its intention that the authorized increases, over and above the

increased costs of material and supplies, other than fuel, had to be used exclusively for reducing deferred maintenance of plant and equipment and delayed capital improvements, the Commission left "to the railroad managements' decision how the funds segregated in accordance with the July 18, 1974, order shall be applied to expenditures for the various specific items of equipment and other properties." Jurisdictional Statement 81a. The Commission pointed out that "the petition and verified statements of railroad officials seeking the increases authorized herein are replete with references to the need for revenues to provide funds for great, but unspecified, amounts of deferred maintenance and delayed capital improvements . . . ." *Id.*, at 81a–82a. The Commission did note that "certain railroads . . . may have anticipated authorization of the increases by initiating improvement projects, or scheduling or otherwise committing and recognizing them in capital budgets prior to June 1, 1974." *Id.*, at 82a. Under those circumstances, if the projects otherwise qualified as delayed capital improvements, the Commission stated that it would be "consistent with the Commission's intention that the authorized increases could be applied" to those projects. *Ibid.*

The present suit was commenced by Chessie on August 15, 1974. Chessie sought to set aside the June 3, July 18, and August 9 orders of the Commission. No other railroad joined in this action. On August 18, a single District Judge issued a temporary restraining order which prohibited the Commission from "enforcing the limiting conditions on the use of plaintiffs' revenues and of certain reporting conditions included in [the] Orders . . . ." App. 33.

On August 16, most of the country's railroads filed with the Commission another petition for clarification

and modification of its July 18 and August 9 orders. The Commission reopened the matter and held oral argument on August 27. Appellee Chessie System resisted appearing at this argument on the ground that its filing a complaint in the United States District Court deprived the Commission of further jurisdiction over it. The Commission, however, ordered that counsel representing the Chessie System be present at oral argument and be prepared to orally "show cause why any change should be made in the conditions and requirements contained in the outstanding orders in this proceeding." Jurisdictional Statement 91a–92a.

On October 3, the Commission concluded that if any railroad was "unable to use the full amount of the funds generated by the increase for deferred maintenance or delayed capital improvements" it might "expend such funds for new and additional capital improvements providing advance approval is obtained from the Commission . . . ." *Id.*, at 104a. Chessie amended its complaint in the District Court to challenge this order as well. It claimed that its maintenance and capital projects will not qualify as "new and additional capital improvement," App. 37, under the Commission's order since that order defined such projects as those "over and above those presently undertaken, scheduled or otherwise committed . . . ." *Id.*, at 38.

The District Court enjoined the Interstate Commerce Commission from enforcing against Chessie those portions of the challenged orders that required revenues derived from *Ex parte No. 305* to be spent for specified purposes. After rejecting the preliminary defenses raised by the Commission, the court concluded that the conditions imposed by the Commission on the expenditures of the increased revenues were unlawful. The

court began with the proposition that the Commission can impose conditions that have been expressly or impliedly authorized by law. It found, of course, no express authorization in the Interstate Commerce Act for the Commission to condition withholding suspension of a rate increase on how the additional revenue is spent. Examining the possibility of implied authority, the court noted that the Commission had not previously conditioned withholding the suspension of rates on control of a railroad's expenditures, and that, therefore, no court had considered the precise issue presented by this case. However, the District Court noted that it had been held, in other contexts, that the Commission lacks statutory authority to order the railroads how to spend their funds. *Missouri Pacific R. Co.* v. *Norwood,* 42 F. 2d 765 (WD Ark. 1930), aff'd, 283 U. S. 249 (1931); *ICC* v. *United States ex rel. Los Angeles,* 280 U. S. 52, 70 (1929). These cases, said the District Court, "unmistakenly establish that the Commission has no general power to control a railroad's expenditures. No provision of [49 U. S. C.] § 15 (7), authorizing suspension of rate increases, implies that the Commission may exercise, as an incident to suspension, the control over expenditures that Congress has otherwise withheld from it." 392 F. Supp., at 367. The court therefore concluded "that Congress has not authorized the Commission to control a carrier's expenditure of funds as a condition to withholding the suspension of rates." *Ibid.* We noted probable jurisdiction. 423 U. S. 923 (1975).

The precise question presented in this case, while one of first impression in this Court, is also a narrow one. In their application before the Commission, the railroads sought to justify the proposed general revenue increase on several grounds, including the need for additional funds for deferred capital and deferred maintenance ex-

penditures. We are confronted with the question of whether the Commission may, as a condition for not suspending and subsequently investigating the lawfulness of a proposed tariff, require the railroads to devote the additional revenues to a need which, they allege, justifies the increase.

The overall statutory mandate of the Commission in railroad ratemaking proceedings can, for present purposes, be stated quite simply. The Congress has charged the Commission with the task of determining whether the rates proposed by the carriers are "just and reasonable." 49 U. S. C. § 1 (5).[7] In fulfilling this obligation, the Commission must assess the proposed rates not only against the backdrop of the National Transportation Policy, 54 Stat. 899, 49 U. S. C. preceding § 1, but also with specific reference to the statutory criteria set forth by the Congress to guide the ratesetting process.[8] These provisions, in short, require the Commission to ensure that the rate imposed on the traveling or the shipping

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[7] On February 5, 1976, while this case was pending, this section was amended by § 202 (a) of the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 34. See Appendix to this opinion for text.

[8] Section 15a (2) of the Interstate Commerce Act, as added at 41 Stat. 488, and amended, 49 U. S. C. § 15a (2), provided:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

This section has been amended by § 205 of the Railroad Revitalization and Regulatory Reform Act (n. 7, *supra*). See Appendix to this opinion for text.

public will support both an economically sound and efficient rail transportation system.

This Court has recently set out the regulatory scheme for the setting of railroad rates mandated by the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 1 *et seq.* See *United States* v. *SCRAP*, 412 U. S. 669, 672–674 (1973). Rates, in the first instance, are set by the railroads. The proposed rate is filed with the Commission and notice is given to the public. After 30 days' notice (or a shorter period, if authorized by the ICC), the rate becomes effective. 49 U. S. C. § 6 (3). The Commission has the authority, during that 30-day period, to suspend the proposed tariff for a maximum of seven months in order to investigate the lawfulness of the new rates. 49 U. S. C. § 15 (7).[9] At the end of the seven-

[9] Section 15 (7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U. S. C. § 15 (7), provided:

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated

month suspension period, the proposed rate becomes effective unless the ICC has, prior to the deadline, completed the investigation and found that the rate is unlawful. See generally *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963). *Ex parte No. 305*, the proceeding at issue here, was a "general revenue proceeding." The railroads, while not seeking specific authority for an increase in the rate applicable to any particular commodity or group of commodities, proposed to increase the average rates charged.

The power to suspend the proposed rates pending investigation—the regulatory tool at issue here—was

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after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

This section has been amended by § 202 (e) of the Railroad Revitalization and Regulatory Reform Act (n. 7, *supra*). See Appendix to this opinion for text.

added to the Interstate Commerce Act by the Mann-Elkins Act of 1910, 36 Stat. 552. Its purpose was to protect the public from the irreparable harm resulting in unjustified increases in transportation costs [10] by giving the Commission "full opportunity for . . . investigation" [11] *before* the tariff became effective. It provided a "means . . . for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory, safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships." 1 I. Sharfman, The Interstate Commerce Commission 59 (1931). The exigencies of competition, seasonal and other demand trends, and the influences of the general economy over a seven-month period can make implementation of this suspension mechanism a particularly potent tool. That potency was well recognized, even at its creation. Senator Elkins referred to it as a "tremendous power." [12] Senator Cummins characterized it as "an order in the nature of a preliminary injunction," [13] a characterization later attributed to an almost identical statute. *Air Freight Forwarder Assn.*, 8 C. A. B. 469, 474 (1947).

The Commission's setting of this particular condition

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[10] See, *e. g.*, S. Rep. No. 94–499, p. 13 (1975), on the recent Railroad Revitalization and Regulatory Reform Act, 90 Stat. 31: "Without suspension, the rate would go into effect and shippers would pass the added cost on to consumers. Upon a finding that a rate was unlawful, shippers could seek a refund, but no such remedy is available to consumers. Thus the power to suspend added an essential element to the Commission's ability to protect the public interest."

[11] 45 Cong. Rec. 3471 (1910) (statement of Sen. Elkins speaking on behalf of the majority report).

[12] *Ibid.*

[13] *Id.*, at 6500.

precedent to the immediate implementation of the rate increase was directly related to its mandate to assess the reasonableness of the rates and to suspend them pending investigation if there is a question as to their legality. The ICC could have simply suspended the rates originally proposed by the railroads for the full statutory seven-month period. Instead, it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented. The railroads had made the representation that the increase was justified, at least in part, by the need to take care of deferred maintenance and deferred capital expenditures. If the railroads did, in fact, use the increased revenues for such purposes, the Commission perceived no reason to impose a suspension of the tariff or to undertake a lengthy investigation and, consequently, no reason to frustrate the clear congressional intent that "just and reasonable" rates be implemented. Delay through suspension would only have aggravated the already poor condition of some of the railroads. On the other hand, the Commission was cognizant of a history of poor financial planning by the railroads in regard to outlays of this nature. *Supra,* at 504 n. 4. If the revenues derived from the new tariffs, once received, were used for other purposes, an investigation prior to their implementation might indeed be warranted.

In upholding what we find to be a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation, we do not imply that the Commission may involve itself in the financial management of the carriers. See *ICC* v. *United States ex rel. Los Angeles,* 280 U. S. 52 (1929). The action taken by the Commission here is both conceptually and functionally different from any attempt to

require specific management action, whether it be of a financial or operational nature; it specified no particular projects and it set no priorities. In deciding not to suspend the rates and investigate their lawfulness on the condition that the revenues be used in the broadly defined areas of "delayed capital improvements" and "deferred maintenance," the Commission simply held the railroads to their representation that the increase was justified by needs in these two areas. The railroads were, of course, not required to submit a tariff imposing such a condition on the use of the resulting revenue. They had the option to continue to insist on an unconditional increase, to submit proof of its reasonableness to the Commission, and, if successful, or if the investigation were not completed within the statutory seven-month period, to collect rates based on the new tariffs.

In this Court, Chessie has argued that its particular financial situation makes it unable to use *Ex parte No. 305* revenues and, consequently, the application of the Commission's action to it is arbitrary and capricious. The Commission, on the other hand, submits that there is sufficient evidence in the proceedings before it to demonstrate that Chessie did in fact have deferred maintenance items upon which these revenues could be expended. Moreover, the Commission points out that Chessie was not required to join the other railroads in the cancellation of the original tariff and the refiling of the one conditioned on the use of revenues in these two areas. Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it so chooses, may raise the matter on remand in the District Court.

Accordingly, the judgment is reversed, and the case is

remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

Selected Sections of the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94–210, 90 Stat. 31:

SEC. 202. (a) Section 1 (5) of the Interstate Commerce Act (49 U. S. C. 1 (5)) is amended by inserting "(a)" immediately after "(5)" and by adding at the end thereof the following new sentence: "The provisions of this subdivision shall not apply to common carriers by railroad subject to this part."

(b) Section 1 (5) of the Interstate Commerce Act (49 U. S. C. 1 (5)), as amended by subsection (a) of this section, is further amended by adding at the end thereof the following new subdivisions:

"(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this part shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the 'proponent carrier'). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that

such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.

"(c) As used in this part, the terms—

"(i) 'market dominance' refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

"(ii) 'rate' means any rate or charge for the transportation of persons or property.

"(d) Within 240 days after the date of enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15 (9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules."

. . . . .

(e) Section 15 of the Interstate Commerce Act (49 U. S. C. 15), as amended by this Act, is further amended—

(1) by adding at the end of paragraph (7) thereof the following new sentence: "This paragraph shall not apply to common carriers by railroad subject to this part."; and

(2) by inserting a new paragraph (8) as follows:

"(8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge,

classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

"(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

"(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part or, following promulgation of standards and procedures under section 1 (5) (d) of this part, if the carrier is found to have market dominance, within the meaning of section 1 (5) (c) (i) of this part, over the service to which such rate increase applies; or

"(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

"(c) The limitations upon the Commission's power to suspend rate

changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

"(i) the rate increase or decrease is filed within 2 years after the date of the enactment of this subdivision;

"(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

"(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1976; and

"(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365 day-period following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1977.

"(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

"(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

"(ii) it is likely that such complainant will prevail on the merits. The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

"(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is

equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

"(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse effect (in violation of section 2 or 3 of this part) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time."

. . . . .

SEC. 205. Section 15a of the Interstate Commerce Act (49 U. S. C. 15a) is amended—

(1) by adding at the end of paragraph (2) and at the end of paragraph (3) the following new sentence: "This paragraph shall not apply to common carriers by railroad subject to this part."; and

(2) by redesignating paragraph (4) as paragraph (6), and by inserting immediately after paragraph (3) the following new paragraph:

"(4) With respect to common carriers by railroad, the Commission shall, within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a rea-

sonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels. No rate of a common carrier by railroad shall be held up to a particular level to protect the traffic of any other carrier or mode of transportation, unless the Commission finds that such rate reduces or would reduce the going concern value of the carrier charging the rate."

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART joins, dissenting.

The question presented is not whether it is desirable for a railroad to spend its money wisely. It clearly is. The question is not whether Congress could authorize the Interstate Commerce Commission to regulate a railroad's expenditure of funds for capital improvements, deferred maintenance, or costs of material. It clearly could. The question is simply whether or to what extent Congress did grant the Commission such authority.[1]

If the power the Commission purports to exercise in this case really exists, it is rather surprising that it has lain dormant for so long and has been disavowed so often.[2] Nowhere in the voluminous statutory language

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[1] Cf. *NAACP* v. *FPC*, 425 U. S. 662, 665. See also *id.*, at 673–674 (BURGER, C. J., concurring in judgment) (emphasizing the need for caution before concluding that Congress authorized the Federal Power Commission to regulate business practices not previously regulated by that agency).

[2] As recently as 1971, the Commission disavowed precisely the position it has taken in this case. Referring to a report finding a need for the railroads to double their expenditures for equipment and facilities, the Commission stated:

"The development of capital for investments of the type recommended in this report remains the function of management and is not a measure of the reasonableness of rate levels. It is to be hoped that the earning capacity of the carriers will be such as to

quoted by the Court can I find an authorization to the Commission to impose direct regulatory controls on a railroad's expenditures. Nor is there any precedent for this action in either the Commission's decisions, see n. 2, *supra*, or in the decisions of this Court. Quite the contrary, the holdings in *ICC* v. *United States ex rel. Los Angeles*, 280 U. S. 52, that the Commission lacked power to compel the railroads to construct a new passenger station, and in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, that the Commission could not order a railroad to furnish tank cars for shipping oil, imply that the Commission possesses no such power.[3]

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enable them to command adequate investment money on either a debt or equity basis. *That capacity, however, has reference to their individual management and concerns a problem distinct from the lawfulness of their rates.*" *Ex parte No. 265*, Increased Freight Rates, 1970 and 1971, 339 I. C. C. 125, 180–181 (1971) (emphasis added).

The Commission has repeatedly disavowed any general power to require railroads to purchase and maintain sufficient equipment for adequate service. *Duralite Co., Inc.* v. *Erie Lackawanna R. Co.*, 339 I. C. C. 312, 314 (1971); *Adequacies—Passenger Service—Southern Pac. Co.*, 335 I. C. C. 415, 423–425 (1969); *Oliver Mfg. Supply Co.* v. *Reading R. Co.*, 297 I. C. C. 654, 658 (1956); *Jacksonville Port Terminal Operators Assn.* v. *Alabama, T. & N. R. Co.*, 263 I. C. C. 111, 116 (1945); *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. Co.*, 229 I. C. C. 497, 502 (1938). The Commission has made the same representation to Congress. ICC 86th Annual Report 23 (1972); ICC 84th Annual Report 9 (1970); ICC 70th Annual Report 83 (1956).

[3] The Court distinguishes *Los Angeles* and presumably *Pennsylvania R. Co.* as well on the grounds (a) that the Commission has conditioned the rate increase only upon expenditures in the broad categories of "delayed capital improvements" and "deferred maintenance," (b) that the railroads themselves represented that they needed the increase for such expenditures, and (c) that the Commission only exercised its suspension powers and the railroads remained free to seek a general rate increase. *Ante*, at 514–515. The second and third reasons are discussed *infra*, at 523–525, and n. 6. The first

If the Commission may not impose such regulation directly, it is equally impermissible for it to do so indirectly by attaching conditions to its approval of rate increases.[4] For periodic rate adjustments are inevitable in response to the ever-present pressures of economic change and it is almost equally inevitable that carriers will assert all available grounds in support of such adjustments. The petition in the present case sought to justify the increase for a variety of overlapping reasons: the increased cost of wages, fuel, and materials; increased interest rates; the decreased access of railroads to capital markets; the need to prevent deterioration of existing equipment; the need to modernize and expand capacity

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is plainly insufficient, for administrative intrusion into managerial decisionmaking does not decrease as the scope of the decision increases. In this case, the intrusion is great precisely *because* the decision is general: whether to allocate an increase in revenues to operating expenses, to deferred capital and maintenance expenditures, or to other purposes. For the Chessie, the increased revenues at stake are approximately $29.7 million for the first three quarters of 1975. App. 346, 357, 368, 379, 390, 401, 412, 423, 434. Nationwide, the Commission estimated that a 10% increase would produce a $1.5 billion increase in annual revenues for the industry, of which 70%, less increased income taxes, is subject to the disputed condition. *Ex parte No. 305*, Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974; Orders of Apr. 30, 1974, May 3, 1974, and July 18, 1974; Jurisdictional Statement 28a, 33a, 59a.

[4] An order allowing a rate increase subject to a condition is in no sense equivalent to an order allowing a rate increase without conditions but upon a finding that the increase is needed for only one purpose. In the former case, the condition may be enforced by actions for injunctions and forfeitures. 49 U. S. C. §§ 16 (7)–(9), (12). In the latter, the railroad could not be forced to rescind the rate increase without a full hearing to determine whether its rates were "unjust or unreasonable." 49 U. S. C. § 15 (1). By itself, I would think proof that the increased revenue had been expended for other purposes would be insufficient to show that the increased rates were "unjust or unreasonable," at least in the absence of intentional misrepresentation in the prior rate increase proceedings.

to meet increased demand; the disparity between the rate of inflation and past increases in railroad rates.[5] Any one of these justifications could, on the Court's rationale, furnish the predicate for Commission regulation of decisions heretofore regarded as the prerogative of railroad management. The Commission's power to work its will in the form of conditional approvals, if valid, is only slightly less pervasive than the power to regulate affirmatively.[6]

Nor do I believe the Commission's action can be supported as an exercise of some sort of inherent equitable power to order specific performance by the Chessie of a commitment it has made. The description of industry conditions in the petition for the general rate increase was entirely accurate. It did not purport to describe the condition of each railroad in the country. The revenue needs of financially sound railroads, like the Chessie, are vastly different from those of bankrupt and near-bankrupt lines.[7] General rate increase proceedings are not principally concerned with the revenue needs of particular railroads but serve the quite different purpose of determining whether an increase is appropriate on an industrywide or an areawide basis. As this Court recognized in *United States* v. *Louisiana*, 290

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[5] *Ex parte No. 305, supra;* App. 101–119.

[6] The Commission's suspension power, upon which the Court relies, *ante*, at 512–515, is an equally insufficient predicate for the exercise of control over expenditures. Since the Commission cannot impose the condition in the exercise of its ratemaking powers, it cannot accomplish the same result by suspending the rate increase to coerce the railroads into "consenting" to the condition by submitting a tariff to that effect.

[7] One railroad represented that it needed the increase in order to meet payrolls and another that it needed the increase to accelerate a bankruptcy reorganization program. *Ex parte No. 305, supra;* App. 109–110, 112.

U. S. 70, general rate increase proceedings would prove impossible "if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, [the Commission] were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule." *Id.*, at 75–76. The primary concern must be with industrywide or areawide economic conditions, not with the financial condition of particular carriers. Indeed, the petition for a general rate increase in this case did not contain any representations specifically addressed to the financial condition of the Chessie and the attached schedules contained financial statements of the Chessie of unchallenged accuracy.[8] There was no misdescription of the industry and there was no misdescription of the Chessie.

But even if the petition had misrepresented the prosperous financial condition of the Chessie, the proper remedy would have been to suspend the rate increase as it applied to the Chessie.[9] The reason the Commission did not take this step is that it would have forced competing railroads to lower their rates and hence would have denied them the increased revenues they need to make improvements.[10] Thus, the Commision's position is not

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[8] *Ex parte No. 305, supra,* and Schedules A and B; App. 95–124, 142–154.

[9] The broad language of §§ 15 and 15a of the Interstate Commerce Act, both before and after their recent amendments, contemplates suspension and regulation of rates of individual carriers. See *ante,* at 510–512, nn. 8, 9, and *ante,* at 517–521.

[10] The Commission has candidly stated its reasons for not suspending the rate increase with respect to individual railroads:

"in theory the Commission could discipline a railroad that misled it about the uses to which it would put revenues collected only with the Commission's permission by reducing that line's rates and requiring it to make refunds. But because the railroads compete with

that conditional rate increases are necessary to maintain the integrity of the ratemaking process, but rather that they are necessary for either of two very different purposes: to prevent strong railroads from making excess profits at the rates necessary to provide a reasonable return to weak railroads; [11] or to protect weak railroads from competition at the lower rates that would otherwise be imposed on strong railroads.[12]

Section 15a of the Interstate Commerce Act once contained a provision that served precisely these purposes. The Transportation Act of 1920, 41 Stat. 456, added to § 15a a "Recapture Clause," which applied to "net railway operating income substantially and unreasonably in excess of a fair return upon the value of . . . railway property held for and used in the service of transportation." § 422, 41 Stat. 489. The Recapture Clause required that one-half the excess revenues be paid to the Commission and placed in a special fund for loans to less prosperous railroads and that the remainder be kept by the railroad in a special reserve fund that

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each other (freight usually can be sent over two or more lines using different routes to reach the same destination), if the Commission ordered an offending railroad to reduce its rates other lines would be compelled to follow suit and would themselves be deprived of the funds they need to make improvements." Brief for Appellants 22.

[11] I do not mean to express the opinion that Chessie's profits would be excessive at the increased rate.

[12] The Commission's position is in fact somewhat broader: Any railroad that failed to make deferred capital and maintenance expenditures in the appropriate amounts, but charged the full increased rate, would receive an unjust and unreasonable rate. *Ex parte No. 305, supra;* Order of June 3, 1974; Jurisdictional Statement 42a–43a. Consequently, the condition was necessary either to prevent all such railroads from receiving an unreasonable return, or to avoid imposing a lower rate on such railroads and thus putting competitive pressure on the railroads that do make the prescribed expenditures.

could be used only for purposes specified in the statute. 41 Stat. 489–491. Together with the provision in the 1920 Act that first authorized general rate proceedings, 41 Stat. 488, the Recapture Clause permitted the Commission to prevent strong railroads from making excess profits while enabling it to set general rates high enough to give weak railroads a reasonable return.[13] However, the Recapture Clause was repealed, and the excess revenues fund redistributed, by the Emergency Railroad Transportation Act, 1933, §§ 205, 206, 48 Stat. 220. The repeal was in part attributable to the economic distress of the railroads during the Great Depression, but Congress was also impressed by reasons of a more permanent character. The House Committee on Interstate and Foreign Commerce reported the repealer favorably, relying on the following testimony of the chairman of the legislative committee of the Interstate Commerce Commission:

> " 'There is something incongruous in a system of regulation which finds it necessary to permit carriers to earn more than they ought to earn, and meets the difficulty by taking money away after

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[13] The language of the Recapture Clause stated as much:

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States." 41 Stat. 489.

it is received.' " H. R. Rep. No. 193, 73d Cong., 1st Sess., 30 (1933).

The parallel with what the Commission has purported to do in the present case—permit the Chessie to earn more than it should but forbid expenditure of the excess—is striking. The only difference is that the Commission asserts this power without express authorization, relying instead upon its broad power to prescribe "just and reasonable rates" under § 15a (2) of the Interstate Commerce Act, as it read before its recent amendment.[14] Ironically, that provision was enacted by the same section of the same Act that repealed the Recapture Clause, § 205 of the Emergency Railroad Transportation Act, 1933, 48 Stat. 220. It is doubtful that Congress would have used the general language of former § 15a (2) to confer, by implication, a broader power than it had previously granted in express terms and with specific limitations in the Recapture Clause. It is inconceivable that it intended to do so in the same section of the same Act that repealed the Recapture Clause.

I would affirm the judgment of the District Court.

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[14] See *ante*, at 510 n. 8.

Syllabus

KLEPPE, SECRETARY OF THE INTERIOR *v.* NEW MEXICO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 74–1488. Argued March 23, 1976—Decided June 17, 1976

The Wild Free-roaming Horses and Burros Act (Act) was enacted to protect "all unbranded and unclaimed horses and burros on public lands of the United States" from "capture, branding, harassment, or death," to accomplish which "they are to be considered in the area where presently found, as an integral part of the natural system of the public lands." The Act provides that all such animals on the public lands administered by the Secretary of the Interior through the Bureau of Land Management (BLM) or by the Secretary of Agriculture through the Forest Service are committed to the jurisdiction of the respective Secretaries, who are "directed to protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands," and if the animals stray from those lands onto privately owned land, the private landowners may inform federal officials, who shall arrange to have the animals removed. Appellees, the State of New Mexico, its Livestock Board and director, and the purchaser of three unbranded burros seized by the Board (pursuant to the New Mexico Estray Law) on federal lands and sold at public auction, and whose return to public lands had been demanded by the BLM, brought this suit for injunctive relief and for a declaratory judgment that the Act is unconstitutional. A three-judge District Court held the Act unconstitutional and enjoined its enforcement. *Held:* As applied to this case, the Act is a constitutional exercise of congressional power under the Property Clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art. IV, § 3, cl. 2. Pp. 535–547.

(a) The Clause, in broad terms, empowers Congress to determine what are "needful" rules "respecting" the public lands, and there is no merit to appellees' narrow reading that the provision

grants Congress power only to dispose of, to make incidental rules regarding the use of, and to protect federal property. The Clause must be given an expansive reading, for "[t]he power over the public lands thus entrusted to Congress is without limitations," *United States* v. *San Francisco*, 310 U. S. 16, 29, and Congress' complete authority over the public lands includes the power to regulate and protect the wildlife living there. Pp. 536–541.

(b) In arguing that the Act encroaches upon state sovereignty and that Congress can obtain exclusive legislative jurisdiction over the public lands in a State only by state consent (absent which it may not act contrary to state law), appellees have confused Congress' derivative legislative power from a State pursuant to Art. I, § 8, cl. 17, with Congress' powers under the Property Clause. Federal legislation under that Clause necessarily, under the Supremacy Clause, overrides conflicting state laws. And here, though the Act does not establish exclusive federal jurisdiction over the public lands in New Mexico, it overrides the New Mexico Estray Law insofar as that statute attempts to regulate federally protected animals. Pp. 541–546.

(c) The question of the Act's permissible reach under the Property Clause over private lands to protect wild free-roaming horses and burros that have strayed from public land need not be, and is not, decided in the context of this case. Pp. 546–547.

406 F. Supp. 1237, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Randolph argued the cause for appellant. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Taft, Edmund B. Clark,* and *Dirk D. Snel.*

George T. Harris, Jr., Special Assistant Attorney General of New Mexico, argued the cause and filed a brief for appellees.*

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*Briefs of *amici curiae* urging reversal were filed by *Murdaugh Stuart Madden* for the Humane Society of the United States; by *Paul A. Lenzini* for the International Association of Game, Fish,

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is whether Congress exceeded its powers under the Constitution in enacting the Wild Free-roaming Horses and Burros Act.

I

The Wild Free-roaming Horses and Burros Act, 85 Stat. 649, 16 U. S. C. §§ 1331–1340 (1970 ed., Supp. IV), was enacted in 1971 to protect "all unbranded and unclaimed horses and burros on public lands of the United States," § 2 (b) of the Act, 16 U. S. C. § 1332 (b) (1970 ed., Supp. IV), from "capture, branding, harassment, or death." § 1, 16 U. S. C. § 1331 (1970 ed., Supp. IV). The Act provides that all such horses and burros on the public lands administered by the Secretary of the Interior through the Bureau of Land Management (BLM) or by the Secretary of Agriculture through the Forest Service are committed to the jurisdiction of the respective Secretaries, who are "directed to protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." § 3 (a), 16 U. S. C. § 1333 (a) (1970 ed., Supp. IV). If protected horses or burros

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and Conservation Commissioners; and by *Thomas H. Wakefield* for Hope Ryden.

Ronald A. Zumbrun and *John H. Findley* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *V. Frank Mendicino*, Attorney General, and *Sterling A. Case*, Assistant Attorney General, for the State of Wyoming et al.; by *Robert List*, Attorney General, for the Nevada State Board of Agriculture; by *Jack E. Hull* and *John C. Miller* for the Central Committee of Nevada State Grazing Boards et al.; and by *David R. Belding* and *William I. Althen* for Wild Horse Organized Assistance, Inc.

"stray from public lands onto privately owned land, the owners of such land may inform the nearest federal marshal or agent of the Secretary, who shall arrange to have the animals removed." [1] § 4, 16 U. S. C. § 1334 (1970 ed., Supp. IV).

Section 6, 16 U. S. C. § 1336 (1970 ed., Supp. IV), authorizes the Secretaries to promulgate regulations, see 36 CFR § 231.11 (1975) (Agriculture); 43 CFR pt. 4710 (1975) (Interior), and to enter into cooperative agreements with other landowners and with state and local governmental agencies in furtherance of the Act's purposes. On August 7, 1973, the Secretaries executed such an agreement with the New Mexico Livestock Board, the agency charged with enforcing the New Mexico Estray Law, N. M. Stat. Ann. § 47–14–1 *et seq.* (1966).[2] The agreement acknowledged the authority of the Secretaries to manage and protect the wild free-roaming horses and burros on the public lands of the United States within the State and established a procedure for evaluating the claims of private parties to ownership of such animals.

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[1] The landowner may elect to allow straying wild free-roaming horses and burros to remain on his property, in which case he must so notify the relevant Secretary. He may not destroy any such animals, however. § 4 of the Act, 16 U. S. C. § 1334 (1970 ed., Supp. IV).

[2] Under the New Mexico law, an estray is defined as:

"Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty (50) miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico . . . ." N. M. Stat. Ann. § 47–14–1 (1966).

It is not disputed that the animals regulated by the Wild Free-roaming Horses and Burros Act are estrays within the meaning of this law.

The Livestock Board terminated the agreement three months later. Asserting that the Federal Government lacked power to control wild horses and burros on the public lands of the United States unless the animals were moving in interstate commerce or damaging the public lands and that neither of these bases of regulation was available here, the Board notified the Secretaries of its intent

> "to exercise all regulatory, impoundment and sale powers which it derives from the New Mexico Estray Law, over all estray horses, mules or asses found running at large upon public or private lands within New Mexico . . . . This includes the right to go upon Federal or State lands to take possession of said horses or burros, should the Livestock Board so desire." App. 67, 72.

The differences between the Livestock Board and the Secretaries came to a head in February 1974. On February 1, 1974, a New Mexico rancher, Kelley Stephenson, was informed by the BLM that several unbranded burros had been seen near Taylor Well, where Stephenson watered his cattle. Taylor Well is on federal property, and Stephenson had access to it and some 8,000 surrounding acres only through a grazing permit issued pursuant to § 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U. S. C. § 315b. After the BLM made it clear to Stephenson that it would not remove the burros and after he personally inspected the Taylor Well area, Stephenson complained to the Livestock Board that the burros were interfering with his livestock operation by molesting his cattle and eating their feed.

Thereupon the Board rounded up and removed 19 unbranded and unclaimed burros pursuant to the New Mexico Estray Law. Each burro was seized on the pub-

lic lands of the United States[3] and, as the director of the Board conceded, each burro fit the definition of a wild free-roaming burro under § 2 (b) of the Act. App. 43. On February 18, 1974, the Livestock Board, pursuant to its usual practice, sold the burros at a public auction. After the sale, the BLM asserted jurisdiction under the Act and demanded that the Board recover the animals and return them to the public lands.

On March 4, 1974, appellees[4] filed a complaint in the United States District Court for the District of New Mexico seeking a declaratory judgment that the Wild Free-roaming Horses and Burros Act is unconstitutional and an injunction against its enforcement. A three-judge court was convened pursuant to 28 U. S. C. § 2282.

Following an evidentiary hearing, the District Court held the Act unconstitutional and permanently enjoined the Secretary of the Interior (Secretary) from enforcing its provisions.[5] The court found that the Act "conflicts with . . . the traditional doctrines concerning wild animals," *New Mexico* v. *Morton*, 406 F. Supp. 1237, 1238 (1975), and is in excess of Congress' power under the Property Clause of the Constitution, Art. IV, § 3, cl. 2. That Clause, the court found, enables Congress to regulate wild animals found on the public land only for the "*protection* of the public lands from damage of some kind." 406 F. Supp., at 1239 (emphasis in original). Accordingly, this power was exceeded in this

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[3] The record is somewhat unclear on this point, but appellees conceded at oral argument that all the burros were seized on the public lands of the United States. Tr. of Oral Arg. 35.

[4] Appellees are the State of New Mexico, the New Mexico Livestock Board, the Board's director, and a purchaser of three of the burros seized at Taylor Well.

[5] Since appellees did not file suit against the Secretary of Agriculture, the District Court's injunction was limited to the Secretary of the Interior, who is the appellant in this Court.

case because "[t]he statute is aimed at protecting the wild horses and burros, not at protecting the land they live on." *Ibid.*[6] We noted probable jurisdiction, 423 U. S. 818 (1975), and we now reverse.

II

The Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., Art. IV, § 3, cl. 2. In passing the Wild Free-roaming Horses and Burros Act, Congress deemed the regulated animals "an integral part of the natural system of the public lands" of the United States, § 1, 16 U. S. C. § 1331 (1970 ed., Supp. IV), and found that their management was necessary "for achievement of an ecological balance on the public lands." H. R. Conf. Rep. No. 92–681, p. 5 (1971). According to Congress, these animals, if preserved in their native habitats, "contribute to the diversity of life forms within the Nation and enrich the lives of the American people." § 1, 16 U. S. C. § 1331 (1970 ed., Supp. IV). See Hearing on Protection of Wild Horses and Burros on Public Lands before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 69, 122, 128, 138, 169, 183 (1971). Indeed, Congress concluded, the wild free-roaming horses and burros "are living symbols of the historic

[6] The court also held that the Act could not be sustained under the Commerce Clause because "all the evidence establishes that the wild burros in question here do not migrate across state lines" and "Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute." 406 F. Supp., at 1239. While the Secretary argues in this Court that the Act is sustainable under the Commerce Clause, we have no occasion to address this contention since we find the Act, as applied, to be a permissible exercise of congressional power under the Property Clause.

and pioneer spirit of the West." § 1, 16 U. S. C. § 1331 (1970 ed., Supp. IV). Despite their importance, the Senate committee found:

> "[These animals] have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. They have been used for target practice and harassed for 'sport' and profit. In spite of public outrage, this bloody traffic continues unabated, and it is the firm belief of the committee that this senseless slaughter must be brought to an end." S. Rep. No. 92–242, pp. 1–2 (1971).

For these reasons, Congress determined to preserve and protect the wild free-roaming horses and burros on the public lands of the United States. The question under the Property Clause is whether this determination can be sustained as a "needful" regulation "respecting" the public lands. In answering this question, we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress. *United States* v. *San Francisco*, 310 U. S. 16, 29–30 (1940); *Light* v. *United States*, 220 U. S. 523, 537 (1911) *United States* v. *Gratiot*, 14 Pet. 526, 537–538 (1840).

Appellees argue that the Act cannot be supported by the Property Clause. They contend that the Clause grants Congress essentially two kinds of power: (1) the power to dispose of and make incidental rules regarding the use of federal property; and (2) the power to protect federal property. According to appellees, the first power is not broad enough to support legislation protecting wild animals that live on federal property; and the second power is not implicated since the Act is designed to protect the animals, which are not them-

selves federal property, and not the public lands. As an initial matter, it is far from clear that the Act was not passed in part to protect the public lands of the United States[7] or that Congress cannot assert a property interest in the regulated horses and burros superior to that of the State.[8] But we need not consider whether the Act can be upheld on either of these grounds, for we reject appellees' narrow reading of the Property Clause.

Appellees ground their argument on a number of cases that, upon analysis, provide no support for their position. Like the District Court, appellees cite *Hunt* v. *United States,* 278 U. S. 96 (1928), for the proposition that the Property Clause gives Congress only the limited power to regulate wild animals in order to protect the public lands from damage. But *Hunt,* which upheld the Government's right to kill deer that were damaging foliage in the national forests, only holds that damage to the land is a sufficient basis for regulation; it contains no suggestion that it is a necessary one.

Next, appellees refer to *Kansas* v. *Colorado,* 206 U. S. 46, 89 (1907). The referenced passage in that case states that the Property Clause "clearly . . . does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits." But this does no more than articulate the obvious: The Property Clause is a

[7] Congress expressly ordered that the animals were to be managed and protected in order "to achieve and maintain a thriving natural ecological balance on the public lands." § 3 (a), 16 U. S. C. § 1333 (a) (1970 ed., Supp. IV). Cf. *Hunt* v. *United States,* 278 U. S. 96 (1928).

[8] See *infra,* at 545–546. The Secretary makes no claim here, however, that the United States owns the wild free-roaming horses and burros found on public land.

grant of power only over federal property. It gives no indication of the kind of "authority" the Clause gives Congress over its property.

Camfield v. *United States*, 167 U. S. 518 (1897), is of even less help to appellees. Appellees rely upon the following language from *Camfield:*

> "While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, *so long as such power is directed solely to its own protection.*" *Id.*, at 525–526 (emphasis added).

Appellees mistakenly read this language to limit Congress' power to regulate activity on the public lands; in fact, the quoted passage refers to the scope of congressional power to regulate conduct on *private* land that affects the public lands. And *Camfield* holds that the Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property. *Camfield* contains no suggestion of any limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits.

Lastly, appellees point to dicta in two cases to the effect that, unless the State has agreed to the exercise of federal jurisdiction, Congress' rights in its land are "only the rights of an ordinary proprietor . . . ." *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 527 (1885).

See also *Paul* v. *United States,* 371 U. S. 245, 264 (1963). In neither case was the power of Congress under the Property Clause at issue or considered and, as we shall see, these dicta fail to account for the raft of cases in which the Clause has been given a broader construction.[9]

In brief, beyond the *Fort Leavenworth* and *Paul* dicta, appellees have presented no support for their position that the Clause grants Congress only the power to dispose of, to make incidental rules regarding the use of, and to protect federal property. This failure is hardly surprising, for the Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. *United States* v. *San Francisco,* 310 U. S., at 29–30; *Light* v. *United States,* 220 U. S., at 537; *United States* v. *Gratiot,* 14 Pet., at 537–538. And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations." *United States* v. *San Francisco, supra,* at 29. See *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 294–295 (1958); *Alabama* v. *Texas,* 347 U. S. 272, 273 (1954); *FPC* v. *Idaho Power Co.,* 344 U. S. 17, 21 (1952); *United States* v. *California,* 332 U. S. 19, 27 (1947); *Gibson* v. *Chouteau,* 13 Wall. 92, 99 (1872); *United States* v. *Gratiot, supra,* at 537.

The decided cases have supported this expansive reading. It is the Property Clause, for instance, that pro-

[9] Indeed, *Hunt* v. *United States, supra,* and *Camfield* v. *United States,* 167 U. S. 518 (1897), both relied upon by appellees, are inconsistent with the notion that the United States has only the rights of an ordinary proprietor with respect to its land. An ordinary proprietor may not, contrary to state law, kill game that is damaging his land, as the Government did in *Hunt;* nor may he prohibit the fencing in of his property without the assistance of state law, as the Government was able to do in *Camfield.*

vides the basis for governing the Territories of the United States. *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 673–674 (1945); *Balzac* v. *Porto Rico*, 258 U. S. 298, 305 (1922); *Dorr* v. *United States*, 195 U. S. 138, 149 (1904); *United States* v. *Gratiot*, *supra*, at 537; *Sere* v. *Pitot*, 6 Cranch 332, 336–337 (1810). See also *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 381 (1948). And even over public land within the States, "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." *Camfield* v. *United States*, *supra*, at 525. We have noted, for example, that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them . . . ." *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 405 (1917). And we have approved legislation respecting the public lands "[i]f it be found to be necessary for the protection of the public, or of intending settlers [on the public lands]." *Camfield* v. *United States*, *supra*, at 525. In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain. *Alabama* v. *Texas*, *supra*, at 273; *Sinclair* v. *United States*, 279 U. S. 263, 297 (1929); *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474 (1915). Although the Property Clause does not authorize "an exercise of a general control over public policy in a State," it does permit "an exercise of the complete power which Congress has over particular public property entrusted to it." *United States* v. *San Francisco*, *supra*, at 30 (footnote omitted). In our view, the "complete power" that

Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.[10]

III

Appellees argue that if we approve the Wild Free-roaming Horses and Burros Act as a valid exercise of Congress' power under the Property Clause, then we have sanctioned an impermissible intrusion on the sovereignty, legislative authority, and police power of the State and have wrongly infringed upon the State's traditional trustee powers over wild animals. The argument appears to be that Congress could obtain exclusive legislative jurisdiction over the public lands in the State only by state consent, and that in the absence of such consent Congress lacks the power to act contrary to state law. This argument is without merit.

Appellees' claim confuses Congress' derivative legis-

[10] Appellees ask us to declare that the Act is unconstitutional because the animals are not, as Congress found, "fast disappearing from the American scene." § 1, 16 U. S. C. § 1331 (1970 ed., Supp. IV). At the outset, no reason suggests itself why Congress' power under the Property Clause to enact legislation to protect wild free-roaming horses and burros "from capture, branding, harassment, or death," *ibid.*, must depend on a finding that the animals are decreasing in number. But responding directly to appellees' contention, we note that the evidence before Congress on this question was conflicting and that Congress weighed the evidence and made a judgment. See Hearing on Protection of Wild Horses and Burros on Public Lands before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 1–2, 7, 11–14, 17, 26–32, 80, 87–88, 101, 103, 134–136, 139–141 (1971). What appellees ask is that we reweigh the evidence and substitute our judgment for that of Congress. This we must decline to do. *United States* v. *San Francisco*, 310 U. S. 16, 29–30 (1940); *Light* v. *United States*, 220 U. S. 523, 537 (1911); *United States* v. *Gratiot*, 14 Pet. 526, 537–538 (1840). See also *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 594 (1939). In any event, we note that Congress has provided for periodic review of the administration of the Act. § 10, 16 U. S. C. § 1340 (1970 ed., Supp. IV).

lative powers, which are not involved in this case, with its powers under the Property Clause. Congress may acquire derivative legislative power from a State pursuant to Art. I, § 8, cl. 17, of the Constitution by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land. *Paul* v. *United States*, 371 U. S., at 264; *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S., at 541–542.[11] In either case, the legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power, *e. g.*, *Pacific Coast Dairy* v. *Dept. of Agriculture of Cal.*, 318 U. S. 285 (1943), to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority. *E. g.*, *Paul* v. *United States*, *supra*, at 265; *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 528–530 (1938); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 147–149 (1937).

But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the

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[11] Article I, § 8, cl. 17, of the Constitution provides that Congress shall have the power:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

The Clause has been broadly construed, and the acquisition by consent or cession of exclusive or partial jurisdiction over properties for any legitimate governmental purpose beyond those itemized is permissible. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 528–530 (1938).

Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. *Mason Co.* v. *Tax Comm'n of Washington,* 302 U. S. 186, 197 (1937); *Utah Power & Light Co.* v. *United States,* 243 U. S., at 403–405; *Ohio* v. *Thomas,* 173 U. S. 276, 283 (1899). And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U. S. Const., Art. VI, cl. 2. See *Hunt* v. *United States,* 278 U. S., at 100; *McKelvey* v. *United States,* 260 U. S. 353, 359 (1922). As we said in *Camfield* v. *United States,* 167 U. S., at 526, in response to a somewhat different claim: "A different rule would place the public domain of the United States completely at the mercy of state legislation."

Thus, appellees' assertion that "[a]bsent state consent by complete cession of jurisdiction of lands to the United States, exclusive jurisdiction does not accrue to the federal landowner with regard to federal lands within the borders of the State," Brief for Appellees 24, is completely beside the point; and appellees' fear that the Secretary's position is that "the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states," *id.,* at 16, is totally unfounded. The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those state laws conflict with the Wild Free-roaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede. *McKelvey* v. *United States, supra,* at 359.

Again, none of the cases relied upon by appellees are to the contrary. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 650 (1930), merely states the rule outlined above that, "without more," federal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State. Likewise, *Wilson* v. *Cook*, 327 U. S. 474, 487–488 (1946), holds only that, in the absence of consent or cession, the Federal Government did not acquire exclusive jurisdiction over certain federal forest reserve lands in Arkansas and the State retained legislative jurisdiction over those lands. No question was raised regarding Congress' power to regulate the forest reserves under the Property Clause. And in *Colorado* v. *Toll*, 268 U. S. 228, 230–231 (1925), the Court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause.[12]

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[12] Referring to the Act creating the National Park, the Court said:

"There is no attempt to give exclusive jurisdiction to the United States, but on the contrary the rights of the State over the roads are left unaffected in terms. Apart from those terms the State denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government. The statute establishing the park would not be construed to attempt such a result. As the [park superintendent] is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed." 268 U. S., at 231 (citations omitted).

While Colorado thus asserted that, absent cession, the Federal Government lacked power to regulate the highways within the park, and the Court held that the State was entitled to attempt to prove that it had not surrendered legislative jurisdiction to the United States, at most the case stands for the proposition that where

In short, these cases do not support appellees' claim that upholding the Act would sanction an impermissible intrusion upon state sovereignty. The Act does not establish exclusive federal jurisdiction over the public lands in New Mexico; it merely overrides the New Mexico Estray Law insofar as it attempts to regulate federally protected animals. And that is but the necessary consequence of valid legislation under the Property Clause.

Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. *Toomer* v. *Witsell,* 334 U. S. 385, 402 (1948); *Lacoste* v. *Department of Conservation,* 263 U. S. 545, 549 (1924); *Geer* v. *Connecticut,* 161 U. S. 519, 528 (1896). But, as *Geer* v. *Connecticut* cautions, those powers exist only "in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." *Ibid.* "No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers." *Missouri* v. *Holland,* 252 U. S. 416, 434 (1920). Thus, the Privileges and Immunities Clause, U. S. Const., Art. IV, § 2, cl. 1, precludes a State from imposing prohibitory licensing fees on nonresidents shrimping in its waters, *Toomer* v. *Witsell, supra;* the Treaty Clause, U. S. Const., Art. II, § 2, permits Congress to enter into and enforce a treaty to protect migratory birds despite state objections, *Missouri* v. *Holland, supra;* and the Property Clause gives Congress the power to thin overpopulated herds of deer on federal

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Congress does not purport to override state power over public lands under the Property Clause and where there has been no cession, a federal official lacks power to regulate contrary to state law.

lands contrary to state law. *Hunt* v. *United States*, 278 U. S. 96 (1928). We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding.

IV

In this case, the New Mexico Livestock Board entered upon the public lands of the United States and removed wild burros. These actions were contrary to the provisions of the Wild Free-roaming Horses and Burros Act. We find that, as applied to this case, the Act is a constitutional exercise of congressional power under the Property Clause. We need not, and do not, decide whether the Property Clause would sustain the Act in all of its conceivable applications.

Appellees are concerned that the Act's extension of protection to wild free-roaming horses and burros that stray from public land onto private land, § 4, 16 U. S. C. § 1334 (1970 ed., Supp. IV), will be read to provide federal jurisdiction over every wild horse or burro that at any time sets foot upon federal land. While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, *Camfield* v. *United States*, 167 U. S. 518 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act. We have often declined to decide important questions regarding "the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case," *Longshoremen* v. *Boyd*, 347 U. S. 222, 224 (1954), or in the absence of "an adequate and full-bodied record." *Public Affairs Press* v. *Rickover*, 369 U. S. 111, 113 (1962). Cf. *Eccles* v. *Peoples Bank*, 333 U. S. 426

(1948). We follow that course in this case and leave open the question of the permissible reach of the Act over private lands under the Property Clause.

For the reasons stated, the judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

FEDERAL ENERGY ADMINISTRATION ET AL. *v.* ALGONQUIN SNG, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-382. Argued April 20, 1976—Decided June 17, 1976

Section 232 (b) of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, provides that if the Secretary of the Treasury finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President is authorized to "take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security." When it appeared that a prior program established under § 232 (b) for adjusting oil imports was not fulfilling its objectives, the Secretary of the Treasury initiated an investigation. On the basis of this investigation the Secretary found that crude oil and its derivatives and related products were being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security, and accordingly recommended to the President that appropriate action be taken to reduce the imports. Following this recommendation, the President promptly issued a Proclamation, *inter alia*, raising the license fees on imported oil. Thereafter, respondents—eight States and their Governors, 10 utility companies, and a Congressman—brought suits against petitioners challenging the license fees on the ground, *inter alia*, that they were beyond the President's authority under § 232 (b). The District Court denied relief, holding that § 232 (b) is a valid delegation to the President of the power to impose license fees on imports, and that the procedures followed by the President and the Secretary in imposing the fees fully complied with the statute. The Court of Appeals reversed, holding that § 232 (b) does not authorize the President to impose a license fee scheme as a method of adjusting imports, but encompasses only the use of "direct" controls such as quotas. *Held:* Section 232 (b) authorizes the action taken by the President. Pp. 558–571.

(a) Section 232 (b) does not constitute an improper delegation

of power, since it establishes clear preconditions to Presidential action, including a finding by the Secretary of the Treasury that an article is being imported in such quantities or under such circumstances as to threaten to impair the national security. Moreover, even if these preconditions are met, the President can act only to the extent he deems necessary to adjust the imports so that they will not threaten to impair the national security, and § 232 (c) sets forth specific factors for him to consider in exercising his authority. Pp. 558–560.

(b) In authorizing the President to "take such action and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives," § 232 (b)'s language clearly grants him a measure of discretion in determining the method used to adjust imports, and there is no support in the statute's language that the authorization to the President to "adjust" imports should be read to encompass only quantitative methods, *i. e.*, quotas, as opposed to monetary methods, *i. e.*, license fees, of effecting such adjustments; so to limit the word "adjust" would not comport with the range of factors that can trigger the President's authority under § 232 (b)'s language. Pp. 561–562.

(c) Furthermore, § 232 (b)'s legislative history amply indicates that the President's authority extends to the imposition of monetary exactions, *i. e.*, license fees and duties, and belies any suggestion that Congress, despite its use of broad language in the statute itself, intended to confine the President's authority to the imposition of quotas and to bar him from imposing a license fee system such as the one in question. Pp. 562–571.

171 U. S. App. D. C. 113, 518 F. 2d 1051, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Solicitor General Bork argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Lee, Mark L. Evans, Leonard Schaitman,* and *David M. Cohen.*

Francis X. Bellotti, Attorney General of Massachusetts, and *Harold B. Dondis* argued the cause for respondents. With them on the brief were *S. Stephen Rosenfeld* and *Thomas R. Kiley,* Assistant Attorneys

General, *James S. Hostetler, William F. Griffin, Jr.*, and *William R. Connole.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 232 (b) of the Trade Expansion Act of 1962, 76 Stat. 877, as amended by § 127 (d) of the Trade Act of 1974, 88 Stat. 1993, 19 U. S. C. § 1862 (b) (1970 ed., Supp. IV), provides that if the Secretary of the Treasury finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President is authorized to

> "take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security." [1]

**Peter Buck Feller, John D. Heckert*, and *David M. Repass* filed a brief for McClure & Trotter as *amicus curiae* urging affirmance.

[1] Section 232 (b) provides in full:

"Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the 'Secretary') shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or

All parties to this case agree that § 232 (b) authorizes the President to adjust the imports of petroleum and petroleum products by imposing quotas on such imports. What we must decide is whether § 232 (b) also author-

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otherwise beginning an investigation under this subsection. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."

Section 232 (c) of the Act, 19 U. S. C. § 1862 (c) (1970 ed., Supp. IV) provides the President and the Secretary of the Treasury with guidance as to some of the factors to be considered in implementing § 232 (b). It provides:

"For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security."

izes the President to control such imports by imposing on them a system of monetary exactions in the form of license fees.

I

The predecessor statute to § 232 (b) was originally enacted by Congress as § 7 of the Trade Agreements Extension Act of 1955, c. 169, 69 Stat. 166 (see n. 21, *infra*), and amended by § 8 of the Trade Agreements Extension Act of 1958, Pub. L. 85–686, 72 Stat. 678. The advisory function currently performed under § 232 (b) by the Secretary of the Treasury was performed by the Director of the Office of Defense Mobilization (ODM) under the 1955 and 1958 statutes. But, like § 232 (b), those statutes allowed the President, on a finding that imports of an article were threatening "to impair the national security," to "take such action as he deem[ed] necessary to adjust the imports of [the] article . . . ." In 1959, President Eisenhower, having been advised by the Director of ODM that " 'crude oil and the principal crude oil derivatives and products are being imported in such quantities and under such circumstances as to threaten to impair the national security,' " invoked the 1958 version of the provision and established the Mandatory Oil Import Program (MOIP). Presidential Proclamation No. 3279, 3 CFR 11 (1959–1963 Comp.). The MOIP, designed to reduce the gap between domestic supply and demand by encouraging the development of domestic production and refinery capacity, imposed a system of quotas on the importation of petroleum and petroleum products. The program was not wholly successful, however, and in the face of domestic consumption which continued to grow faster than domestic production, Presidents Kennedy, Johnson, and Nixon each felt compelled to amend it by raising the permissible quota levels. App. 211–212.

In light of a Cabinet task force conclusion that the MOIP, as then constituted, was not fulfilling its objectives,[2] President Nixon, acting pursuant to § 232 (b), radically amended the program in 1973. Presidential Proclamation No. 4210, 3 CFR 31 (1974). The President suspended existing tariffs on oil imports and provided "for a gradual transition from the existing quota method of adjusting imports of petroleum and petroleum products to a long-term program for adjustment of imports of petroleum and petroleum products through . . . the institution of a system of fees applicable to imports of crude oil, unfinished oils, and finished products . . . ." *Id.*, at 32. This amended program established a gradually increasing schedule of license fees for importers. With respect to crude oil, the fee was scheduled to increase from an initial 10½ cents per barrel on May 1, 1973, to 21 cents per barrel on May 1, 1975. With respect to most finished petroleum products, the fee was to rise gradually from 15 cents per barrel on May 1, 1973, to 63 cents per barrel on November 1, 1975.[3] *Id.*, at 36. While initially some oil imports were exempted from the license fee requirements, the exemption levels were scheduled to decrease annually so that by 1980 the fees would be applicable to all oil imports.

President Nixon's 1973 program apparently did not wholly fulfill the objectives to which it was directed. Accordingly, the Secretary of the Treasury, acting pursuant to § 232 (b), see n. 1, *supra*, initiated an investigation on January 4, 1975, "to determine the effects on the national security of imports of petroleum and petroleum products." Memorandum from Secretary of the Treasury Simon to Assistant Secretary of the Treasury

[2] See Cabinet Task Force on Oil Import Control, The Oil Import Question 128 (1970).

[3] Under President Nixon's plan, the fee for motor gasoline was scheduled to reach its maximum of 63 cents on May 1, 1975. App. 97.

MacDonald (Simon Memorandum), App. 154. While § 232 (b) directs the Secretary "if it is appropriate [to do so, to] hold public hearings or otherwise afford interested parties an opportunity to present information and advice" as part of such an investigation, 19 U. S. C. § 1862 (b) (1970 ed., Supp. IV), the Secretary found that such procedures would interfere with "national security interests" and were "inappropriate" in this case. Simon Memorandum, App. 154. The investigation therefore proceeded without any public hearing or call for submissions from interested nongovernmental parties.

The Secretary submitted a report on his investigation to President Ford on January 14, 1975. Intimating that the measures then in force under § 232 (b) had indeed not solved the problems to which they were directed, the Secretary indicated that the United States' dependence on foreign oil had continued to increase since 1966 and that foreign sources currently accounted for well over a third of domestic consumption. The Secretary concluded that

> "crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar are being imported into the United States in such quantities as to threaten to impair the national security [and] the foregoing products are being imported into the United States under such circumstances as to threaten to impair the national security." App. 133.

On the basis of these findings, the Secretary recommended to the President that

> "appropriate action be taken to reduce imports of crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar into the United States . . . ." *Ibid.*

The President agreed with the findings of the Secretary's investigation and concluded that it was "necessary and consistent with the national security to further discourage importation into the United States of petroleum, petroleum products, and related products . . . ." Presidential Proclamation No. 4341, 3A CFR 2 (1975). Invoking § 232 (b), he issued a Proclamation on January 23, 1975, which, effective immediately, raised the so-called "first-tier" license fees that were imposed in 1973, see *supra,* at 553, to the maximum levels previously scheduled to be reached only some months later.[4] Presidential Proclamation No. 4341, *supra.* The Proclamation also imposed on all imported oil, whether covered by the first-tier fees or not, a supplemental fee of $1 per barrel for oil entering the United States on or after February 1, 1975. The supplemental fee was scheduled to rise to $2 a barrel for oil entering after March 1, 1975, and to $3 per barrel for oil entering after April 1, 1975.[5] Finally, the Proclamation reinstated the tariffs that had been suspended in April 1973. Soon after issuance of the Proclamation, the Federal Energy Administration (FEA) amended its oil import regulations in order to implement the new program. 40 Fed. Reg. 4771–4776 (1975).

Four days after the Proclamation was issued, respond-

[4] The Proclamation did not alter the schedule by which exemptions from the first-tier fees were not to be eliminated until 1980.

[5] The supplemental fee increases scheduled to go into effect in March and April were twice deferred. See Presidential Proclamation No. 4355, 3A CFR 26 (1975); Presidential Proclamation No. 4370, 3A CFR 45 (1975). While the $2 fee finally went into effect on June 1, 1975, Presidential Proclamation No. 4377, 3A CFR 53 (1975), it was never increased to $3. Indeed, on January 3, 1976, President Ford eliminated the $2 fee. Presidential Proclamation No. 4412, 3 CFR 3 (1977). See n. 8, *infra.*

ents—eight States and their Governors,[6] 10 utility companies,[7] and Congressman Robert F. Drinan of Massachusetts—challenged the license fees in two suits filed against the Secretary of the Treasury, the Administrator of the FEA, and the Treasurer of the United States in the United States District Court for the District of Columbia. Seeking declaratory and injunctive relief, they alleged that the imposition of the fees was beyond the President's constitutional and statutory authority, that the fees were imposed without necessary procedural steps having been taken, and that petitioners (hereinafter the Government) violated the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, by failing to prepare an environmental impact statement prior to the imposition of the fees.

The District Court denied respondents' motions for preliminary injunctions and filed findings of fact and conclusions of law which, at the request of respondents, it later declared to be final. See 171 U. S. App. D. C. 113, 124, 126, 518 F. 2d 1051, 1062, 1064 (1975) (appendix to dissenting opinion in Court of Appeals). The court found that § 232 (b) is a valid delegation to the President of the power to impose license fees on oil imports. *Id.*, at 128–129, 518 F. 2d, at 1066–1067. It further ruled that the procedures followed by the Presi-

[6] The States joining in the suit together with their Governors were Connecticut, Maine, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The State of Minnesota intervened as a plaintiff after the complaint was filed and is also a respondent here.

[7] The 10 utility companies are Algonquin SNG, Inc., New England Power Co., New Bedford Gas and Edison Light Co., Cambridge Electric Light Co., Canal Electric Co., Montaup Electric Co., Connecticut Light and Power Co., Hartford Electric Light Co., Western Massachusetts Electric Light Co., and Holyoke Water Power Co.

dent and the Secretary of the Treasury in imposing the license fees fully conformed to the requirements of the statute. *Id.*, at 130, 518 F. 2d, at 1068. Finally, the court held that "in view of the emergency nature of the problem and the need for prompt action," *id.*, at 131, 518 F. 2d, at 1069, the Government was not required to file an environmental impact statement prior to imposition of the fees and hence was not in violation of the NEPA. *Ibid.*

Respondents' appeals from these judgments were consolidated with their petitions to the Court of Appeals for the District of Columbia Circuit for review of the FEA regulations implementing the license fee program. The allegations in the challenges to the regulations were substantially the same as those raised in the District Court actions, adding only a contention that the FEA had failed to follow certain procedural provisions of the Federal Energy Administration Act, 88 Stat. 97, 15 U. S. C. §§ 761 *et seq.* (1970 ed., Supp. IV). The Court of Appeals, with one judge dissenting, held that § 232 (b) does not authorize the President to impose a license fee scheme as a method of adjusting imports. 171 U. S. App. D. C. 113, 518 F. 2d 1051 (1975). According to the court, reading the statute to authorize the action taken by the President "would be an anomalous departure" from "the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs." *Id.*, at 117, 518 F. 2d, at 1055. In the court's view, § 232 (b)'s leglislative history indicated that Congress' authorization of the President to "adjust the imports of [an] article" encompassed only the use of "direct" controls such as quotas and did not encompass the use of license fees. *Id.*, at 121, 518 F. 2d, at 1059. Finding no need to address any of the other issues that were raised, the court reversed the judgment of the District Court, in-

structed that court to enter appropriate relief for respondents, and set aside the challenged FEA regulations.

We granted the Government's petition for certiorari, 423 U. S. 923 (1975),[8] and now reverse. Both the language of § 232 (b) and its legislative history lead us to conclude that it authorizes the action taken by the President in this case.[9]

II

A

Preliminarily, we reject respondents' suggestion that we must construe § 232 (b) narrowly in order to avoid

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[8] Subsequent to our granting certiorari, the President signed the Energy Policy and Conservation Act of 1975, 89 Stat. 871, 42 U. S. C. § 6201 *et seq.* (1970 ed., Supp. V). That Act is aimed at encouraging domestic oil production by gradually decontrolling the price of domestically produced crude oil. On January 3, 1976, indicating that "the purposes of the supplemental [oil import license] fee" will be served by the Act, the President announced the elimination of the supplemental fees imposed by Presidential Proclamation No. 4341, 3A CFR 2 (1975). Presidential Proclamation No. 4412, 3 CFR 3 (1977). He did not, however, eliminate the "first-tier" fees originally imposed by Presidential Proclamation No. 4210, 3 CFR 31 (1974). Since respondents seek to enjoin the first-tier as well as the supplemental fees, the question here whether § 232 (b) grants the President authority to impose license fees remains a live controversy.

[9] Respondents' suits are not barred by the Anti-Injunction Act, 26 U. S. C. § 7421 (a), which in relevant part provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . ." The Anti-Injunction Act applies to suits brought to restrain assessment of taxes assessable under the Internal Revenue Codes of 1954 and 1939. 26 U. S. C. §§ 7421 (a), 7851 (a)(6)(A), 7851 (a)(6)(C)(iv). The license fees in this case are assessed under neither Code but rather under the authority conferred on the President by the Trade Expansion Act of 1962, as amended by the Trade Act of 1974. The fees are therefore not "taxes" within the scope of the Anti-Injunction Act.

"a serious question of unconstitutional delegation of legislative power." Brief for Respondents 42. Even if § 232 (b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack.

In *Hampton & Co.* v. *United States,* 276 U. S. 394 (1928), this Court upheld the constitutionality of a provision empowering the President to increase or decrease import duties in order to equalize the differences between foreign and domestic production costs for similar articles. There, the Court stated:

> "If Congress shall lay down by legislative act an intelligible principle to which the [President] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.,* at 409.

Section 232 (b) easily fulfills that test. It establishes clear preconditions to Presidential action—*inter alia,* a finding by the Secretary of the Treasury that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The President can act only to the extent "he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." And § 232 (c), see n. 1, *supra,* articulates a series of specific factors to be considered by the President in exercising his authority under § 232 (b).[10] In light of these factors and

[10] Respondents rely on our decision in *National Cable Television Assn.* v. *United States,* 415 U. S. 336 (1974), to support their delegation doctrine argument. But we find that case clearly distin-

our recognition that "[n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . ," *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 105 (1946), we see no looming problem of improper delegation [11] that should affect our reading of § 232 (b).

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guishable from the one before us today. In *National Cable Television*, we held that the fees to be imposed on community antenna television systems should be measured by the "value to the recipient" even though the language of the general statute allowing fee setting by federal agencies, 31 U. S. C. § 483a, permits consideration not only of "value to the recipient" but also of "public policy or interest served, and other pertinent facts." The Court's conclusion that the words of the last-quoted phrase were not relevant to the CATV situation was apparently motivated by a desire to avoid any delegation doctrine problem that might have been presented by a contrary conclusion. 415 U. S., at 342. But what might be considered the open-ended nature of the phrase "public policy or interest served, and other pertinent facts" stands in contrast to § 232 (b)'s more limited authorization of the President to act only to the extent necessary to eliminate a threat of impairment to the national security, and § 232 (c)'s articulation of standards to guide the President in making the decision whether to act. See n. 1, *supra*.

[11] The amount of oil exempted from the "first-tier" license fees, see *supra*, at 553, imposed in 1973 varies among five geographical districts within the Nation. See Presidential Proclamation No. 4341, 3A CFR 2 (1975); Presidential Proclamation No. 4210, 3 CFR 31 (1974). Respondents seize on this fact to argue that the "first-tier" fee schedule contravenes Art. I, § 8, cl. 1, of the Constitution which requires that import duties be uniform throughout the United States. But that issue is not properly before the Court. Sustaining respondents' Uniformity Clause argument would call, not for invalidation of the entire license fee scheme, but only for elimination of the geographical differences in the exemptions allowed under it. This would represent not an affirmance of the judgments below, which effectively invalidated the entire scheme and its implementing regulations, but rather a modification of those judgments. But since respondents filed no cross-petition for certiorari, they are at this point precluded from seeking such modification. See *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 381 n. 4 (1970).

B

In authorizing the President to "take such action, and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives," the language of § 232 (b) seems clearly to grant him a measure of discretion in determining the method to be used to adjust imports. We find no support in the language of the statute for respondents' contention that the authorization to the President to "adjust" imports should be read to encompass only quantitative methods—*i. e.*, quotas—as opposed to monetary methods—*i. e.*, license fees—of effecting such adjustments.

Indeed, reading respondents' suggested limitation into the word "adjust" would be inconsistent with the range of factors that can trigger the President's authority under § 232 (b)'s language. Section 232 (b) authorizes the President to act after a finding by the Secretary of the Treasury that a given article is being imported "in such quantities or *under such circumstances* as to threaten to impair the national security." (Emphasis added.) The emphasized language reflects Congress' judgment that "not only the quantity of imports . . . but also the circumstances under which they are coming in: their use, their availability, their character" could endanger the national security and hence should be a potential basis for Presidential action. 104 Cong. Rec. 10542–10543 (1958) (remarks of Rep. Mills). It is most unlikely that Congress would have provided that dangers posed by factors other than the strict quantitative level of imports can justify Presidential action, but that that action must be confined to the imposition of quotas. Unless one assumes, and we do not, that quotas will always be a feasible method of dealing directly with national security threats posed by the "circumstances" under which imports are entering the country, limiting the President to the use of quotas would effectively

and artificially prohibit him from directly dealing with some of the very problems against which § 232 (b) is directed.

Turning from § 232's language to its legislative history, again there is much to suggest that the President's authority extends to the imposition of monetary exactions—*i. e.*, license fees and duties. The original enactment of the provision in 1955 as well as Congress' periodic reconsideration of it in subsequent years gives us substantial grounds on which to conclude that its authorization extends beyond the imposition of quotas to the type of action challenged here.

During congressional hearings on the Trade Agreements Extension Act of 1955, there was substantial testimony that increased imports were threatening to damage various domestic industries whose viability was perceived to be critical to the national security.[12] In an effort to deal with the problem, the Senate Committee on Finance considered several proposals designed to supplement the existing statutory provision, known as the Symington Amendment,[13] that barred reductions in duties "on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements." Act of July 1, 1954, Pub. L. 464, § 2, 68 Stat. 360.[14] Among these amend-

[12] See, *e. g.*, Hearings on H. R. 1 before the House Committee on Ways and Means, 84th Cong., 1st Sess., 1006 (analytical balance industry), 1264 (petroleum industry) (1955); Hearings on H. R. 1 before the Senate Committee on Finance, 84th Cong., 1st Sess., 602 (lead and zinc mining industry), 721 (coal mining industry) (1955).

[13] The Symington Amendment is currently codified in somewhat modified form at 19 U. S. C. § 1862 (a).

[14] In contrast to the Senate Committee on Finance, the House Committee on Ways and Means concluded that the Symington Amendment was adequate to deal with any potential threats to the

ments was one proposed by Senator Neely which provided in relevant part:

> "[T]he President shall take *such action as is necessary* to restrict imports of commodities whenever such imports threaten to retard the domestic development and expansion or maintenance of domestic production of natural resource commodities or any other commodities which he determines to be essential to the national security. . . ." Hearings on H. R. 1 before the Senate Committee on Finance, 84th Cong., 1st Sess., 1033 (1955) (emphasis added).[15]

In explaining what action would be authorized under the Neely Amendment, Senator Martin, one of its cosponsors, explained that it authorized the President "to take such action as is necessary, including the imposition of import quotas *or the increase in duties,* to protect the domestic industry concerned." *Id.,* at 2097 (emphasis added). Thus, the Neely Amendment clearly would have given the President the authority to impose monetary exactions as a method of restricting imports.

While the Neely Amendment was not reported out of committee, it is strikingly similar in language to the Byrd-Millikin Amendment—the substitute provision that was reported out and eventually enacted into law. The Byrd-Millikin Amendment authorized the President, after appropriate recommendations had been made by the Director of the ODM, to "take such action as he deems necessary to adjust the imports of [an] article to a level that will not threaten to impair the national security." S. Rep. No. 232, 84th Cong., 1st Sess., 14

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national security posed by foreign imports. H. R. Rep. No. 50, 84th Cong., 1st Sess., 44 (1955).

[15] A separate portion of the Neely Amendment would have placed quotas on petroleum imports.

(1955).[16] Given the similarity in the operative language of the two proposals, it is fair to infer that if, as Senator Martin stated, the Neely Amendment was intended to authorize the imposition of monetary exactions, so too was the Byrd-Millikin Amendment.

The debate on the Senate floor lends further support to this reading of the Byrd-Millikin Amendment. Senator Millikin himself stated without contradiction that the Amendment authorized the President "to take whatever action he deems necessary to adjust imports . . . [including the use of] tariffs, quotas, import taxes or other methods of import restriction." 101 Cong. Rec. 5299 (1955). As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute. *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 640 (1967); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395 (1951).[17]

Senator Millikin's statement does not stand alone. Senator Byrd, another of the Amendment's sponsors, explained in colloquy with Senator Saltonstall that the Amendment put all commodities *"on the same basis as agricultural commodities.* It simply leaves to the President the power, in his discretion, to decide whether to impose a quota or to reduce the imports." 101 Cong.

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[16] Unlike the Neely Amendment, see n. 15, *supra*, the Byrd-Millikin Amendment did not single out any named industries for protection by quotas.

[17] Differing with the Court of Appeals, we do not believe that the fact that Senator Millikin represented a State that might have benefited from an expansive reading of the statute "blur[s] [the] probative value," 171 U. S. App. D. C. 113, 120, 518 F. 2d 1051, 1058 (1975), of his explanation. Many if not most pieces of legislation are sponsored by Members of Congress whose constituents have a special interest in their passage, but we have never let this fact diminish the weight we give a sponsor's statements.

Rec. 5297 (1955) (emphasis added). The reference in the emphasized phrase is to § 22 of the Agricultural Adjustment Act, the subject of an earlier exchange between Senator Byrd and Senator Thye. 101 Cong. Rec. 5296 (1955). Section 22 allows the President under certain circumstances to "*impose such fees* . . . or such quantitative limitations" as he finds necessary to protect the domestic production of an agricultural commodity. 49 Stat. 773, as amended, 7 U. S. C. § 624 (b) (emphasis added). Senator Byrd's comparison of § 22 and the Byrd-Millikin Amendment thus appears to reflect his understanding that Presidential authority under the Amendment extended to the imposition of fees.[18]

Finally, we note two other statements on the floor of the Senate which lend direct support to the Government's reading of the Byrd-Millikin Amendment. Senator Bennett stated that it was his understanding that the amendment would authorize use of "the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry." 101 Cong. Rec. 5588 (1955).[19] And Senator Barkley, a member of the Senate Committee on Finance, expressed his understanding that the Amendment would allow the President to "impose such quotas *or take such other steps* as he may believe to be desirable in order to

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[18] Moreover, Senator Byrd's reference in the above-quoted exchange to the power of the President under the Amendment "to impose a quota *or* to reduce the imports," 101 Cong. Rec. 5297 (1955), also suggests that he understood that power to extend beyond the imposition of quotas. See Note, 89 Harv. L. Rev. 432, 435 n. 31 (1975).

[19] The Court of Appeals characterized Senator Bennett's remarks as going to "the entire bill and other existing laws." 171 U. S. App. D. C., at 119, 518 F. 2d, at 1057. Our examination of the context of his remarks persuades us, however, that they were more probably made with specific reference to the Byrd-Millikin Amendment.

maintain the national security." *Id.*, at 5298 (emphasis added).

In the House debate following Senate passage of the Byrd-Milliken Amendment, *id.*, at 5655, and its acceptance with a minor modification by the House conferees, H. R. Conf. Rep. No. 745, 84th Cong., 1st Sess., 2, 6–7 (1955), we find further indications that the Amendment authorized the imposition of monetary exactions. In explaining the provisions of the Amendment, Congressman Cooper, chairman of the House Ways and Means Committee and a member of the Conference Committee, indicated his concern that "*any modification of a duty* on imports or a quota would [because of retaliation from abroad] inevitably result in a curtailment of exports by the United States." 101 Cong. Rec. 8161 (1955) (emphasis added). Furthermore, as part of his explanation of the Amendment, Cooper presented a letter he had received from Gerald D. Morgan, Special Counsel to the President, which expressed the administration's understanding that under the Amendment, the President's action to adjust imports "could take any form that was appropriate to the situation." *Id.*, at 8162.[20] Thus, when Congress finally enacted the Byrd-Millikin Amendment's national security provision, 69 Stat. 166,[21] as part of the

[20] A copy of the Morgan letter was also sent to Senator Byrd, Chairman of the Senate Committee on Finance. See 101 Cong. Rec. 8162 (1955).

[21] As finally enacted the Amendment provided:

"In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If,

Trade Agreement Extension Act of 1955, not only had Members of both Houses indicated that the provision authorized the imposition of monetary exactions, but the Executive Branch, too, had advised the Congress of its understanding of the broad scope of the authority granted by the Amendment.[22]

Three years later, in the context of its consideration of the Trade Agreements Extension Act of 1958, Congress re-examined the Byrd-Millikin national security provision. In the course of its deliberations, the Subcommittee on Foreign Trade Policy of the House Ways and Means Committee had before it a 1957 report submitted to it by the ODM, expressing the views of the Executive Branch that "the imposition of new or increased tariff duties on imports . . . [was] authorized by the language adopted."[23] Fully aware that the Executive

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on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security."

[22] We are not unmindful that, as respondents point out, much of the congressional debate referred to the Byrd-Millikin Amendment in the context of giving the President the power to impose import quotas. See, *e. g.*, 101 Cong. Rec. 5572 (1955) (remarks of Sen. Humphrey); *id.*, at 5582, 5584 (remarks of Sen. Douglas); *id.*, at 5593 (remarks of Sen. Monroney). But nowhere do the congressional debates reflect an understanding that under the Amendment the President's authority was to be *limited* to the imposition of quotas. In light of this fact, we feel fortified in attaching substantial weight to the positive indications discussed above that the authority was not so limited.

[23] Foreign Trade Policy, Compendium of Papers on United States Foreign Trade Policy Collected by the Staff for the Subcommittee on Foreign Trade Policy of the House Ways and Means Committee 643 (1958).

Branch then, as in 1955, understood the provision as authorizing the imposition of monetary exactions, the Committee did not recommend any change in its wording to confine more narrowly the bounds of its authorization. On the contrary, the Committee in its report indicated with approval its own understanding that the statute provided "those best able to judge national security needs . . . [with] a way of taking *whatever action is needed* to avoid a threat to the national security through imports." H. R. Rep. No. 1761, 85th Cong., 2d Sess., 13 (1958) (emphasis added).

While Congress in 1958 made several procedural changes in the statute and established criteria to guide the President's determination as to whether action under the provision might be necessary, it added no limitations with respect to the type of action that the President was authorized to take.[24] § 8, 72 Stat. 678. The 1958 reenactment, like the 1955 provision, authorized the President under appropriate conditions to "take such action" "as he deems necessary to adjust the imports . . . ." *Ibid.*

When the national security provision next came up for re-examination, it was re-enacted without material change as § 232 (b) of the Trade Expansion Act of 1962. In its analysis the Court of Appeals placed great emphasis on the fact that in the course of Congress' deliberations the Senate passed and the Conference Committee deleted, H. R. Conf. Rep. No. 2518, 87th Cong., 2d Sess., 13 (1962), an amendment which provided:

"Notwithstanding any other provision of law, the

[24] Indeed, while under the 1955 provision the President was authorized to act only on a finding that "quantities" of imports threatened to impair the national security, the 1958 provision also authorized Presidential action on a finding that an article is being imported "under such circumstances" as to threaten to impair the national security. 72 Stat. 678. See *supra*, at 561.

> President may, when he finds it in the national interest, proclaim with respect to any article imported into the United States—
>
> "(1) the increase of any existing duty on such article to such rate as he finds necessary;
>
> "(2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary, and
>
> "(3) the imposition of such other import restrictions as he finds necessary." 108 Cong. Rec. 19573 (1962).

The Court of Appeals inferred from the rejection of this amendment that Congress understood the then existing grant of authority to be limited to the imposition of quotas. According to the court, the amendment would have "explicitly [given] the President the same authority he claims derives implicitly from § [232 (b),]" 171 U. S. App. D. C., at 121, 518 F. 2d, at 1059, and Congress' refusal to enact the amendment was tantamount to a rejection of the Government's interpretation of the statute.

We disagree, however, with the Court of Appeals' assessment of the proposed amendment. The amendment was in reality far more than an articulation of the authority that the Government finds to be contained in § 232 (b). Unlike § 232 (b), the rejected proposal would not have required a prior investigation and findings by an executive department as a prerequisite to Presidential action. Moreover, the broad "national interest" language of the proposal, together with its lack of any standards for implementing that language, stands in stark contrast with § 232 (b)'s narrower criterion of "national security" and § 232 (c)'s articulation of standards to guide the invocation of the President's powers under § 232 (b). In light of these clear differences be-

tween the rejected proposal and § 232 (b), we decline to infer from the fact that the Senate amendment was proposed, or from the fact that it was rejected, that Congress felt that the President had no power to impose monetary exactions under § 232 (b).

Only a few months after President Nixon invoked the provision to initiate the import license fee system challenged here, Congress once again re-enacted the Presidential authorization encompassed in § 232 (b) without material change. Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1993. Making no mention of the President's action, both the Senate Committee report and the conference report recited the language of the statute itself to reaffirm that under § 232 (b) the President "may . . . take such action, and for such time, as he deems necessary, to adjust imports so as to prevent impairment of the national security." H. R. Conf. Rep. No. 93–1644, p. 29 (1974); S. Rep. No. 93–1298, pp. 96–97 (1974). The congressional acquiescence in President Nixon's action manifested by the re-enactment of § 232 (b) provides yet further corroboration that § 232 (b) was understood and intended to authorize the imposition of monetary exactions as a means of adjusting imports.

Taken as a whole then, the legislative history of § 232 (b) belies any suggestion that Congress, despite its use of broad language in the statute itself, intended to limit the President's authority to the imposition of quotas and to bar the President from imposing a license fee system like the one challenged here. To the contrary, the provision's original enactment, and its subsequent re-enactment in 1958, 1962, and 1974 in the face of repeated expressions from Members of Congress and the Executive Branch as to their broad understanding of its language, all lead to the conclusion that § 232 (b) does in fact

authorize the actions of the President challenged here. Accordingly, the judgment of the Court of Appeals to the contrary cannot stand.

C

A final word is in order. Our holding today is a limited one. As respondents themselves acknowledge, a license fee as much as a quota has its initial and direct impact on imports, albeit on their price as opposed to their quantity. Brief for Respondents 26. As a consequence, our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232 (b) in no way compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized.

The judgment of the Court of Appeals is reversed, and this case is remanded to that court for proceedings consistent with this opinion.

So ordered.

EXAMINING BOARD OF ENGINEERS, ARCHITECTS AND SURVEYORS ET AL. *v.* FLORES DE OTERO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

No. 74–1267. Argued December 8, 1975—Decided June 17, 1976*

A Puerto Rico statute permits only United States citizens to practice privately as civil engineers. Appellees are alien civil engineers residing in Puerto Rico, one of whom (Flores de Otero) was denied a license under the statute, and the other of whom (Perez Nogueiro) was granted only a conditional license to work for the Commonwealth. Each appellee brought suit for declaratory and injunctive relief against appellant Examining Board and its members in the United States District Court in Puerto Rico, claiming jurisdiction under 28 U. S. C. § 1343 (3) and alleging that the statute's citizenship requirement violated 42 U. S. C. § 1983. Section 1343 (3) gives district courts jurisdiction of actions "[to] redress the deprivation, under color of any State law" of federal constitutional rights, privileges, or immunities, and § 1983 provides that "[e]very person who, under color of any statute . . . of any State or Territory" deprives another of "any rights, privileges, or immunities secured by the Constitution and laws" shall be liable to the party injured in a proper action. In the *Flores de Otero* action a three-judge court, after determining that it had jurisdiction under § 1343 to enforce § 1983 and that abstention was unnecessary, held the citizenship requirement unconstitutional and directed that Flores be fully licensed as a civil engineer. In a separate and subsequent judgment the same court granted like relief to Perez. *Held:*

1. The District Court had jurisdiction under 28 U. S. C. § 1343 (3) to enforce the provisions of 42 U. S. C. § 1983. Pp. 580–597.

(a) The federal territorial, as well as the United States district and circuit courts, as confirmed by the legislative history

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*Together with *Examining Board of Engineers, Architects and Surveyors et al.* v. *Perez Nogueiro,* also on appeal from the same court (see this Court's Rule 15 (3)).

of §§ 1343 (3) and 1983 and their predecessor statutes, generally had jurisdiction to redress deprivations of constitutional rights by persons acting under color of territorial law. Pp. 581–586.

(b) The history of the legislation specifically respecting Puerto Rico supports the conclusion that the United States District Court in Puerto Rico prior to Puerto Rico's becoming a Commonwealth in 1952 had the same jurisdiction to enforce § 1983 as that conferred by § 1343 (3) and its predecessors on the United States district courts in the several States, and that Congress, by entering into the compact by which Puerto Rico assumed "Commonwealth" status, did not intend to leave the protection of federal rights exclusively to the local Puerto Rico courts and to repeal by implication the jurisdiction of the United States District Court in Puerto Rico to enforce § 1983. Pp. 586–595.

(c) While Puerto Rico occupies a unique relationship to the United States, it does not follow that Congress intended to relinquish enforcement of § 1983 by restricting the jurisdiction of the United States District Court in Puerto Rico, cf. *District of Columbia* v. *Carter*, 409 U. S. 418, and whether Puerto Rico is considered a Territory or a State for purposes of the jurisdictional question is of little consequence because each is included within § 1983 and, therefore, within § 1343 (3). Pp. 595–597.

2. The District Court correctly determined that abstention was unnecessary, since the federal constitutional claim is not complicated by an unresolved state-law question, even though appellees might have sought relief under similar provisions of the Puerto Rico Constitution. *Wisconsin* v. *Constantineau*, 400 U. S. 433; *Harris County Comm'rs Court* v. *Moore*, 420 U. S. 77. Pp. 597–598.

3. Puerto Rico's prohibition of an alien's engaging in the private practice of engineering deprives appellees of "rights, privileges, or immunities secured by the Constitution and laws," within the meaning of § 1983. Pp. 599–606.

(a) The question whether it is the Fifth Amendment or the Fourteenth that protects Puerto Rico residents need not be resolved since, irrespective of which Amendment applies, the statutory restriction on the ability of aliens to engage in the otherwise lawful private practice of civil engineering is plainly unconstitutional. If the Fourteenth Amendment applies, the Equal Protection Clause nullifies the statutory exclusion; whereas, if the Fifth Amendment and its Due Process Clause apply, the statute's discrimination is so egregious as to violate due process. Pp. 599–601.

(b) The validity of the statute must be determined under the principles that state classifications based on alienage are subject to "strict judicial scrutiny," and that laws containing such classifications will be upheld only if the State or Territory imposing them is able to satisfy the burden of demonstrating that "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest," *In re Griffiths*, 413 U. S. 717, 721–722. This burden is not met by any of the following three justifications offered by appellants for the citizenship requirement: (i) to prevent the "uncontrolled" influx of Spanish-speaking aliens in the engineering field in Puerto Rico; (ii) to raise the prevailing low standard of living in Puerto Rico; and (iii) to provide the client of a civil engineer an assurance of financial accountability if a building for which the engineer is responsible collapses. Pp. 601–606.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion dissenting in part, *post*, p. 606. STEVENS, J., took no part in the consideration or decision of the case.

Miriam Naveira De Rodon, Solicitor General of Puerto Rico, argued the cause for appellants. With her on the brief was *Peter Ortiz*, Deputy Solicitor General.

Max Ramirez de Arellano argued the cause for appellees. With him on the brief was *Santos P. Amadeo*.†

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether the United States District Court for the District of Puerto Rico possesses

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†*Solicitor General Bork, Assistant Attorney General Lee, Howard E. Shapiro,* and *David M. Cohen* filed a brief for the United States as *amicus curiae*.

jurisdiction, under 28 U. S. C. § 1343 (3),[1] to entertain a suit based upon 42 U. S. C. § 1983,[2] and, if the answer is in the affirmative, the further issue whether Puerto Rico's restriction, by statute, of licenses for civil engineers to United States citizens is constitutional. The first issue, phrased another way, is whether Puerto Rico is a "State," for purposes of § 1343 (3), insofar as that statute speaks of deprivation "under color of any State law"; the resolution of that question was reserved in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 677 n. 11 (1974).

I

A. Puerto Rico's Act of May 10, 1951, No. 399, as amended, now codified as P. R. Laws Ann., Tit. 20, §§ 681–710 (Supp. 1973), relates to the practice of engineering, architecture, and surveying. The administration and enforcement of the statute, by § 683, are committed to the Commonwealth's Board of Examiners of Engineers, Architects, and Surveyors, an appellant here.

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[1] Title 28 U. S. C. § 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[2] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 689 [3] sets forth the qualifications "for registration as licensed engineer, architect or surveyor." For a "licensed engineer or architect," these qualifications in-

[3] The statute in pertinent part reads:

"§ 689. Qualifications for registration in the Board's registry

"As minimum evidence, satisfactory to the Board, to show that the applicant meets the qualifications for registration as licensed engineer, architect or surveyor, . . . the Board shall accept, as the case may be:

. . . . . .

"(2) For licensed engineer or architect:

"(a) *Graduation, examination and minimum experience.* A certification accrediting his graduation from a course or curriculum of engineering or architecture, of a duration of not less than four (4) academic years or its equivalent, whose efficacy has been adequately verified, in any university, college or institute whose standing and proficiency are accepted by the Board; passing of written examinations (validation) on the fundamental subjects of engineering or architecture; and a detailed history of his professional experience of not less than four years, acquired after his graduation as a professional, satisfactory to the Board, and showing, in the judgment of the Board, that the applicant is qualified to practice as engineer or architect with a degree of professional responsibility which justifies his licensing. . . .

. . . . . .

"[(3)] In addition to what has already been provided in this section, it shall be required that applicants for registration in the Board's registry be citizens of the United States of America and reside in the Commonwealth of Puerto Rico for not less than one year before filing their applications. Provided, that the requisite of being a citizen of the United States of America shall not apply to engineers, architects and surveyors who have studied the total courses and have received their corresponding grade or certificate in the Commonwealth of Puerto Rico provided that the approved course of study and institution where he has studied fulfill the qualifications fixed by sections 681–710 of this title, as the case may be; Provided, That the applicants shall meet all the qualifications fixed by this act for registration in the Board's registry.

"The requisites of residence and United States citizenship shall not apply to engineers, architects or surveyors whom the different agencies or instrumentalities of the Government of the Common-

clude a specified education, the passing of a written examination, and a stated minimum practical experience. The statute also requires that an applicant for registration be a citizen of the United States. It, however, exempts an otherwise qualified alien from the citizenship requirement if he has "studied the total courses" in the Commonwealth, or if he is employed by an agency or instrumentality of the government of the Commonwealth or by a municipal government or public corporation there; in the case of such employment, the alien receives a conditional license valid only during the time he is employed by the public entity.

B. Maria C. Flores de Otero is a native of Mexico and a legal resident of Puerto Rico. She is, by profession, a civil engineer. She is not a United States citizen. In June 1972 she applied to the Board for registration as a licensed engineer. It is undisputed that the applicant met all the specifications of formal education, examina-

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wealth, the municipal governments and the public corporations employ or may wish to employ, it being understood that it shall not be necessary that the applicants be so employed at the time of their application or registration in the Board's registry. The applicants shall meet all the other qualifications fixed by sections 681–710 of this title for registration in the Board's registry.

"Upon compliance with these requirements by a noncitizen of the United States of America, the board shall issue a conditional certificate as graduate engineer, architect or surveyor or a conditional license as engineer, architect or surveyor, as the case may be, valid for the practicing of such professions only in the performance of their employment and during the time they are employed by the above-mentioned public entities . . . .

"Any engineer, architect or surveyor holding a conditional license or graduate engineer or architect with a conditional certificate who obtains the citizenship of the United States of America shall be entitled to apply for reregistration and be reregistered in the Board's registry as a graduate engineer or architect, or a licensed engineer or architect, or a licensed surveyor, as the case may be, in accordance with all the other requirements of the Board."

tion, and practice required for licensure, except that of United States citizenship. The Board denied her application until she furnished proof of that citizenship.

In October 1973 Flores instituted an action in the United States District Court for the District of Puerto Rico against the Board and its individual members. She asserted jurisdiction under 28 U. S. C. § 1343 (3),[4] and alleged that the citizenship requirement was violative of her rights under 42 U. S. C. §§ 1981 and 1983. A declaratory judgment and injunctive relief were requested.

In their answer to Flores' complaint, the defendants alleged that the United States District Court lacked jurisdiction to entertain the complaint, and that the provisions of § 689 did not contravene rights secured under the Fifth and Fourteenth Amendments or any rights guaranteed to Flores under the Constitution. They also alleged that Flores had adequate remedies available to her in the courts of Puerto Rico and that she had not exhausted those remedies. They requested that the court "abstain from assuming jurisdiction in this case and allow the Courts of the Commonwealth of Puerto Rico the opportunity to pass upon the issues raised by plaintiff." App. 5.

C. Sergio Perez Nogueiro is a native of Spain and a legal resident of Puerto Rico. He is, by profession, a civil engineer. He possesses degrees from universities in Spain and Colombia and from the University of Puerto Rico. He is not a United States citizen. He, like Flores, met all the specifications of formal education, examination, and practice required for licensure, except

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[4] Federal-question jurisdiction under 28 U. S. C. § 1331 (a) was not asserted. The defendants, who are appellants here, acknowledge that they "are not here concerned with the general jurisdiction of the local [Federal] District Court under statutes such as 28 U. S. C. [§] 1331." Brief for Appellants 6.

that of United States citizenship. He is presently employed as an engineer by the Public Works Department of the municipality of Carolina, Puerto Rico, and holds a conditional license granted by the Board, as authorized by § 689, after he passed the required examination.[5]

In May 1974 Perez instituted an action against the Board[6] in the United States District Court for the District of Puerto Rico. He asserted that the citizenship requirement "is repugnant to the Due Process Clause of the Fifth or Fourteenth Amendments." App. 10. The complaint in all relevant respects was like that filed by Flores, and Perez, too, requested declaratory and injunctive relief, including a full and unconditional license to practice as an engineer in the Commonwealth.

D. A three-judge court was convened to hear Flores' case. It determined that it had jurisdiction under §§ 1983 and 1343. It concluded that abstention was unnecessary because § 689 was unambiguous and not susceptible of an interpretation that would obviate the need for reaching the constitutional question. On the merits, with one judge dissenting, it rejected the justifications proffered by the defendants for the citizenship requirement. It found that requirement unconsti-

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[5] The certification given appellee Perez reads in part:

"That the approval of this examination grants him the right to practice ENGINEERING solely and exclusively as an employee of Agencies and instrumentalities of the Commonwealth of Puerto Rico, Municipal Governments and Public Corporations.

"I, FURTHER CERTIFY: That the limitation imposed on MR. SERGIO PEREZ NOGUEIRO right to practice *Engineering* are those required . . . because of his citizenship. MR. SERGIO PEREZ NOGUEIRO is entitled to be automatically registered as an ENGINEER without limitations as soon as he presents the Naturalization Certificate as American Citizen." App. 8–9.

[6] The complaint was later amended to include the individual members of the Board as parties defendant.

tutional and directed the defendants to license Flores as an engineer.

In a separate and subsequent judgment the same three-judge court, by the same vote, granted like relief to Perez. It decreed that he, too, be licensed as an engineer. Jurisdictional Statement 7a.

Appeals were taken by the defendants from both judgments, with a single jurisdictional statement pursuant to our Rule 15 (3). We noted probable jurisdiction and granted a stay of the execution and enforcement of the judgments. 421 U. S. 986 (1975).

II

On the jurisdictional issue, the appellants do not contend that the United States Constitution has no application in Puerto Rico [7] or that claims cognizable under § 1983 may not be enforced there. Instead, they argue that unless a complainant establishes the $10,000 jurisdictional amount prescribed by 28 U. S. C. § 1331 (a),[8] a claim otherwise cognizable under § 1983 must be adjudicated in the courts of Puerto Rico.[9]

In approaching this question we are to examine the language of § 1343, the purposes of Congress in enacting it, "and the circumstances under which the words were employed." [10] *Puerto Rico* v. *Shell Co.* (*P. R.*),

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[7] At oral argument, the appellants conceded that the "Fourteenth Amendment or the Fifth Amendment is applicable to the people of Puerto Rico." Tr. of Oral Arg. 5.

[8] Title 28 U. S. C. § 1331 (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

[9] Brief for Appellants 6, 9–10; Tr. of Oral Arg. 37.

[10] Using this approach, the Court has held (a) that the statutes of Puerto Rico *are not* "State" statutes for the purpose of our

Ltd., 302 U. S. 253, 258 (1937); *District of Columbia* v. *Carter*, 409 U. S. 418, 420 (1973). As is so frequently the case, however, the language is not free of ambiguity, the purposes appear to be diverse and sometimes contradictory, and the circumstances are not fully spread upon the record for our instruction.

A. The federal civil rights legislation, with which we are here concerned, was enacted nearly 30 years before the conflict with Spain and the resulting establishment of the ties between Puerto Rico and the United States. Both § 1343 (3) and § 1983 have their origin in the Ku Klux Klan Act of April 20, 1871, § 1, 17 Stat. 13. That statute contained not only the substantive provision protecting against "the deprivation of any rights, privileges, or immunities secured by the Constitution" by any person acting under color of state law, but, as well, the jurisdictional provision authorizing a proceeding for the enforcement of those rights "to be prosecuted in the

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appellate jurisdiction under 28 U. S. C. § 1254 (2), *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42 n. 1 (1970), but (b) that the statutes of Puerto Rico *are* "State" statutes for the purpose of the three-judge court provision of 28 U. S. C. § 2281, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 669–676 (1974). The first decision was based upon the Court's practice to construe narrowly statutes authorizing appeals, and Congress' failure to provide a statute, parallel to 28 U. S. C. § 1258, authorizing appeals from the Supreme Court of Puerto Rico under the same circumstances as appeals from the highest courts of the States. The second decision recognized the greater autonomy afforded Puerto Rico with its assumption of commonwealth status in the early 1950's. Inclusion of the statutes of Puerto Rico within 28 U. S. C. § 2281 served the purpose "of insulating a sovereign State's laws from interference by a single judge." 416 U. S., at 671. See also *Andres* v. *United States*, 333 U. S. 740, 745 (1948); *Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 257–259 (1937); and *Domenech* v. *National City Bank*, 294 U. S. 199, 204–205 (1935).

several district or circuit courts of the United States." [11] Jurisdiction was not independently defined; it was given simply to enforce the substantive rights created by the statute. The two aspects, seemingly, were deemed to coincide.

It has been said that the purpose of the legislation was to enforce the provisions of the Fourteenth, not the Thirteenth, Amendment. *District of Columbia* v. *Carter*, 409 U. S., at 423; *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 545 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961). As originally enacted, § 1 of the 1871 Act applied only to action under color of law of any "State." In 1874, however, Congress, presumably pursuant to its power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," granted by the Constitution's Art. IV, § 3, cl. 2, added, without explanation, the words "or Territory" in the 1874 codification of United States statutes. Rev. Stat. § 1979 (1874). See *District of Columbia* v. *Carter*, 409 U. S., at 424 n. 11. The evident aim

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[11] The first section of the 1871 Act provided:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

was to insure that all persons residing in the Territories not be denied, by persons acting under color of territorial law, rights guaranteed them by the Constitution and laws of the United States.[12]

Although one might say that the purpose of Congress was evident, the method chosen to implement this aim was curious and, indeed, somewhat confusing. In the 1874 codification, only the substantive portion (the predecessor of today's § 1983) of § 1 of the 1871 Act was redesignated as § 1979.[13] It became separated from the jurisdictional portion (the predecessor of today's § 1343 (3)) which appeared as § 563 Twelfth and § 629 Sixteenth (concerning, respectively, the district courts and the circuit courts) of the Revised Statutes. But the words "or Territory" appeared only in § 1979; they did not appear in §§ 563 and 629.

Our question, then, is whether, in separately codifying the provisions and in having this discrepancy between them, Congress intended to restrict federal-court jurisdiction in some way. We conclude that it intended no such restriction. First, as stated above, the common origin of §§ 1983 and 1343 (3) in § 1 of the 1871 Act suggests that the two provisions were meant to be, and are, complementary. *Lynch* v. *Household Finance*

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[12] Another change effected with the codification, and without explanation, was the addition in § 1979 of the words "and laws" following the words "the Constitution."

These changes were retained in § 1979 as it appeared in Rev. Stat. (1878).

[13] Section 1979 provided:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Corp., 405 U. S., at 543 n. 7. There is no indication that Congress intended to prevent federal district and circuit courts from exercising subject-matter jurisdiction of claims of deprivation of rights under color of territorial law if they otherwise had personal jurisdiction of the parties. Second, a contrary interpretation necessarily would lead to the conclusion that persons residing in a Territory were not effectively afforded a federal-court remedy there for a violation of the 1871 Act despite Congress' obvious intention to afford one. The then existing territorial district courts established by Congress were granted "the *same* jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States." Rev. Stat. § 1910 (1874) (emphasis added).[14] Thus, if the federal district and circuit courts had jurisdiction to redress deprivations only under color of state (but not territorial) law, the territorial courts were likewise so limited. Further, the United States District Courts for the Districts of California and Oregon, and the territorial District Court for Washington possessed jurisdiction over violations of laws extended to the Territory of Alaska. Rev. Stat. § 1957 (1874). Unless the federal courts had jurisdiction to redress deprivations of rights by persons acting under color of territorial law,

[14] The then territorial courts were those in the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming. The Territory of Washington was governed by Rev. Stat. § 1911 (1874), which provided, in part, that its territorial district courts shall have "the same jurisdiction in all cases arising under the Constitution of the United States, and the laws of the Territory, as is vested in the circuit and district courts of the United States." It will be noted that the quoted language does not include the words "and laws" after "Constitution." Section 1910, in contrast, did. The omission was soon rectified, however. Rev. Stat. § 1911 (1878).

Congress' explicit extension of the 1871 Act to provide a remedy against persons acting under color of territorial law was only theoretical because no forum existed in which these rights might be enforced.

This conclusion that Congress granted territorial courts jurisdiction to enforce the provisions of § 1979 is strengthened by two additional factors. First, Congress explicitly provided: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States." Rev. Stat. § 1891 (1874). Section 1979, with its reference to Territories was obviously an applicable statute. Second, it was not until the following year that Congress conferred on United States district courts general federal-question jurisdiction.[15] Act of Mar. 3, 1875, § 1, 18 Stat. 470, now codified as 28 U. S. C. § 1331 (a). See generally *Zwickler* v. *Koota*, 389 U. S. 241, 245–247

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[15] Original "arising under" jurisdiction was vested in the federal courts by the Act of Feb. 13, 1801, § 11, 2 Stat. 92, but was repealed a year later by the Act of Mar. 8, 1802, § 1, 2 Stat. 132. There was nothing further along this line until the Act of Mar. 3, 1875. See *District of Columbia* v. *Carter*, 409 U. S. 418, 427 n. 20 (1973).

Revised Stat. § 5600 (1874) provided:

"The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed."

This provision lends some support to our conclusion that the failure to add the words "or Territory" to the jurisdictional successor of § 1 of the 1871 Act was mere legislative oversight. Had § 1 remained intact, the words "or Territory" would have been added to the substantive part of § 1 while the jurisdictional part would have continued to read "such proceeding to be prosecuted in the several district or circuit courts of the United States." 17 Stat. 13.

(1967). Accordingly, unless in 1874 the federal district and circuit courts had jurisdiction to redress deprivations under color of territorial law, Congress, although providing rights and remedies, could be said to have failed to provide a means for their enforcement.

For all these reasons, we conclude that the federal territorial as well as the federal district and circuit courts generally had jurisdiction to redress deprivations of constitutional rights by persons acting under color of territorial law. We turn, then, to the legislation specifically applicable to Puerto Rico.

B. A similar approach was taken by Congress in its establishment of the civil government in Puerto Rico in the exercise of its territorial power under Const., Art. IV, § 3, cl. 2.[16] By the Treaty of Paris, 30 Stat. 1754 (1899), Spain ceded Puerto Rico to the United States. 30 Stat. 1755. Shortly thereafter, the Foraker Act, being the Act of April 12, 1900, 31 Stat. 77, became law. This legislation established a civil government for Puerto

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[16] The powers vested in Congress by Const., Art. IV, § 3, cl. 2, to govern Territories are broad. *District of Columbia* v. *Carter*, 409 U. S., at 430–431; *National Bank* v. *County of Yankton*, 101 U. S. 129, 133 (1880); *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542 (1828). And in the case of Puerto Rico, the Treaty of Paris, 30 Stat. 1754 (1899), specifically provided: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." *Id.*, at 1759. Congress exercised its powers fully. Thus, by the Foraker Act, 31 Stat. 77, the President was authorized to appoint, with the advice and consent of the Senate, the Governor of Puerto Rico, and its chief executive officers, *id.*, at 81; the justices of the Supreme Court of Puerto Rico, and the judge of the United States District Court there. *Id.*, at 84. In addition, Congress required that "all laws enacted by the [Puerto Rico] legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same." *Id.*, at 83.

Rico, including provisions for courts. The judicial structure so created consisted of a local court system with a Supreme Court, and, as well, of a Federal District Court.[17] The Act, § 34, 31 Stat. 84, provided: "The [federal] district court . . . shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States." [18]

On its face, this appears to have been a broad grant of jurisdiction similar to that conferred on the United States district courts and comparable to that conferred on the earlier territorial courts. The earlier territorial grants, however, were different. Whereas the Federal District Court for Puerto Rico was to have "the ordinary jurisdiction of district courts of the United States," the earlier territorial courts had been given explicitly, by Rev. Stat. § 1910 noted above, "the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States." One might expect that

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[17] This establishment of two separate systems of courts stands in contrast to other territorial legislation where only one system of courts, including district courts and a supreme court, was established and given the jurisdiction vested in United States courts. See Rev. Stat. §§ 1864–1869, 1910 (1874). See also *Palmore* v. *United States*, 411 U. S. 389, 402–403 (1973).

[18] Section 34 provided in relevant part:

"That Porto Rico shall constitute a judicial district to be called 'the district of Porto Rico.' The President, by and with the advice and consent of the Senate, shall appoint a district judge . . . for a term of four years, unless sooner removed by the President. The district court for said district shall be called the district court of the United States for Porto Rico . . . and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." 31 Stat. 84.

the grant of jurisdiction in the former necessarily encompassed or was the same as the grant of jurisdiction in the latter. Congress, however, was divided over the question whether the Constitution extended to Puerto Rico by its own force or whether Congress possessed the power to withhold from Puerto Ricans the constitutional guarantees available to all persons within the several States and the earlier Territories. See S. Rep. No. 249, 56th Cong., 1st Sess. (1900); H. R. Rep. No. 249, 56th Cong., 1st Sess. (1900).[19]

The division within Congress was reflected in the legislation governing Puerto Rico. Thus, despite some support for the measure, see S. Rep. No. 249, pp. 12–13, Congress declined to grant citizenship to the inhabitants of Puerto Rico. 33 Cong. Rec. 3690 (1900). And, in contrast to some earlier territorial legislation, Congress did not expressly extend to Puerto Rico the Constitution of the United States or impose on the statutes of Puerto Rico then in effect the condition that they be continued only if consistent with the United States Constitution.[20]

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[19] The report of the majority of the House Committee considering the legislation for Puerto Rico concluded:

"First. That upon reason and authority the term 'United States,' as used in the Constitution, has reference only to the States that constitute the Federal Union and does not include Territories.

"Second. That the power of Congress with respect to legislation for the Territories is plenary." H. R. Rep. No. 249, 56th Cong., 1st Sess., 16 (1900).

But see the minority report, *id.*, at 17–20. This adopts by reference the views of Representative Newlands: "The weight of authorities sustain[s] the proposition that the Constitution, *ex proprio vigore*, controls the action of the Government created by the Constitution wherever it operates, whether in States or Territories." *Id.*, at 29.

[20] The Senate Committee considering the proposed legislation for a civil government in Puerto Rico surveyed the previous territorial legislation to determine when, and under what circumstances, the Congress had extended the Constitution to the Territories. It con-

At the same time, however, Congress undoubtedly was aware of the above-mentioned Rev. Stat. § 1891 providing: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect . . . in every Territory hereafter organized as elsewhere within the United States." Yet no mention of this statute was made in the Foraker Act. In contrast, two years later, Congress made § 1891 expressly inapplicable when it created a civil government for the Territory of the Philippines. Act of July 1, 1902, c. 1369, § 1, 32 Stat. 692.[21] Moreover, Congress, by § 14 of the Foraker Act, extended to Puerto Rico "the statutory laws [other than the internal revenue

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cluded that, as a rule, the organization of a Territory had not been accompanied by an extension of the Constitution. Not until 1850, when Congress established a government for the Territory of New Mexico, did it explicitly provide: "That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States." Act of Sept. 9, 1850, c. 49, § 17, 9 Stat. 452. See S. Rep. No. 249, 56th Cong., 1st Sess., 6 (1900). This provision became the model for subsequent territorial legislation.

[21] "The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands." 32 Stat. 692. Nevertheless, the people of the Philippines were not left unprotected because Congress also provided them with a bill of rights guaranteeing most of the basic protections afforded by the Constitution to persons within the United States. § 5, 32 Stat. 692. See *Kepner* v. *United States*, 195 U. S. 100 (1904).

In *Downes* v. *Bidwell*, 182 U. S. 244 (1901), which presented this Court with its first opportunity to review the constitutionality of the Foraker Act, Mr. Justice Brown referred to Rev. Stat. § 1891 in his opinion but attached no significance to it. 182 U. S., at 257. In contrast, the Court in *Dorr* v. *United States*, 195 U. S. 138, 143 (1904), relied on the 1902 Act's express exclusion of § 1891, in holding that the Constitution, except insofar as required by its own terms, did not extend to the Philippines.

laws] of the United States not locally inapplicable," 31 Stat. 80,[22] and Rev. Stat. § 1979, providing remedies for deprivation of rights guaranteed by the Constitution and laws of the United States by persons acting under color of territorial law was at least potentially "applicable."

This review of the Foraker Act and its legislative history leads to several conclusions: Congress was uncertain of its own powers respecting Puerto Rico and of the extent to which the Constitution applied there. At the same time, it recognized, at least implicitly, that the ultimate resolution of these questions was the responsibility of this Court. S. Rep. No. 249, pp. 9–12; H. R. Rep. No. 249, pp. 9–15, 25–28. Thus Congress appears to have left the question of the personal rights to be accorded to the inhabitants of Puerto Rico to orderly development by this Court and to whatever further provision Congress itself might make for them. The grant of jurisdiction to the District Court in Puerto Rico, nevertheless, appeared to be sufficiently broad to permit redress of deprivations of those rights by persons acting under color of territorial law. See *Insular Police Comm'n* v. *Lopez*, 160 F. 2d 673, 676–677 (CA1), cert. denied, 331 U. S. 855 (1947). Nothing in the language of § 34 of the Foraker Act precluded the grant of ju-

[22] This provision was continued as § 9 of the Organic Act of 1917, 39 Stat. 954: "That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws." This is now part of the Puerto Rican Federal Relations Act, 48 U. S. C. § 734. Although appellants contend that, for a variety of reasons, the federal statutes with which we are concerned should not apply to Puerto Rico, they do not argue that these statutes are "locally inapplicable," within the meaning of the Puerto Rican Federal Relations Act.

risdiction accorded the earlier territorial courts by Rev. Stat. § 1910, and its language, containing no limitations, cautions us against reading into it an exception not supported by persuasive evidence in the legislative history.

Subsequent legislation respecting Puerto Rico tends to support the conclusion that uncertainty over the application of the Constitution did not lead Congress to deprive the inhabitants of Puerto Rico of a federal forum for vindication of whatever rights did exist. In the Organic Act of 1917, sometimes known as the Jones Act, 39 Stat. 951, Congress made more explicit the jurisdiction of the Federal District Court by according it "jurisdiction of all cases cognizable in the district courts of the United States," § 41, 39 Stat. 965; generally granted Puerto Rico citizens United States citizenship, § 5, 39 Stat. 953; and codified for Puerto Rico a bill of rights, § 2, 39 Stat. 951. This bill of rights, which remained in effect until 1952, provided Puerto Ricans with nearly all the personal guarantees found in the United States Constitution.[23] The very first provision, for example, read: "That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." These words are almost identical with the language of the Fourteenth Amendment; and when Congress selected them, it must have done so with the Fourteenth Amendment

[23] Section 2 of the Jones Act, 39 Stat. 951, left only two major exceptions: the right, under the Fifth Amendment, not to "be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," and the right, under the Sixth and Seventh Amendments, to a jury trial. See *Balzac* v. *Porto Rico*, 258 U. S. 298, 306 (1922); S. Rep. No. 1779, 81st Cong., 2d Sess., 2 (1950); H. R. Rep. No. 2275, 81st Cong., 2d Sess., 2 (1950).

in mind and with a view to further development by this Court of the doctrines embodied in it. See *Kepner* v. *United States*, 195 U. S. 100, 124 (1904). In its passage of the Jones Act, Congress clearly set the stage for the federal court in Puerto Rico to enforce the provisions of § 1983's predecessor (Rev. Stat. § 1979) which prohibited the deprivation "under color of any statute, ordinance, regulation, custom, or usage, of any . . . Territory . . . of any rights, privileges, or immunities secured by the Constitution and laws." See *Munoz* v. *Porto Rico Ry. Light & Power Co.*, 83 F. 2d 262, 264–266 (CA1), cert. denied, 298 U. S. 689 (1936).

The jurisdictional provision of the Act, referring to "all cases cognizable in the district courts of the United States," remained in effect until 1948. At that time Congress, in the course of a major revision of the Judicial Code, placed the nonterritorial jurisdiction of the District Court of Puerto Rico, as well as the District Court of Hawaii, squarely within Title 28 of the United States Code. It provided: "Puerto Rico constitutes one judicial district." Act of June 25, 1948, c. 646, § 119, 62 Stat. 889. The stated reason for this change was that "Hawaii and Puerto Rico are included as judicial districts of the United States, since in matters of jurisdiction, powers, and procedure, they are in all respects equal to other United States district courts." H. R. Rep. No. 308, 80th Cong., 1st Sess., 6 (1947). This confirms our conclusion that until the establishment of the Commonwealth, the Federal District Court in Puerto Rico had the same jurisdiction to enforce the provisions of 42 U. S. C. § 1983 as that conferred by 28 U. S. C. § 1343 (3) and its predecessor statutes on the United States district courts in the several States. See *Miranda* v. *United States*, 255 F. 2d 9 (CA1 1958); *Insular Police Comm'n* v. *Lopez*, *supra*.

Only two years later, Congress responded to demands

for greater autonomy [24] for Puerto Rico with the Act of July 3, 1950, c. 446, 64 Stat. 319. This legislation, offered in the "nature of a compact" to "the people of Puerto Rico," § 1, 48 U. S. C. § 731b, authorized them to draft their own constitution which, however, "shall provide a republican form of government and shall include a bill of rights," § 2, 48 U. S. C. § 731c. The proposed constitution thereafter submitted declared that it was drafted "within our union with the United States of America," and that among the "determining factors in our life" were considered "our citizenship of the United States of America" and "our loyalty to the principles of the Federal Constitution." Preamble of the Constitution of Puerto Rico, 1 P. R. Laws Ann. p. 207 (1965). See note following 48 U. S. C. § 731d. Congress approved the proposed constitution after adding, among other things, a condition that any amendment or revision of the document be consistent with "the applicable provisions of the Constitution of the United States." 66 Stat. 327.[25] The condition was accepted, the compact

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[24] In 1947 Congress had given the qualified voters of Puerto Rico the right to select their own governor by popular suffrage. Act of Aug. 5, 1947, c. 490, 61 Stat. 770.

[25] The purpose of the condition was explained:

"Applicable provisions of the United States Constitution and the Federal Relations Act will have the same effect as the Constitution of the United States has with respect to State constitutions or State laws. United States laws not locally inapplicable will have equal force and effect in Puerto Rico as throughout the States except as otherwise provided in the Federal Relations Act. Any act of the Puerto Rican Legislature in conflict with . . . the Constitution of the United States or United States laws not locally inapplicable would be null and void.

"Within this framework, the people of Puerto Rico will exercise self-government. As regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union." S. Rep. No. 1720, 82d Cong., 2d Sess., 6 (1952).

became effective, and Puerto Rico assumed "Commonwealth" status. This resulted in the repeal of numerous provisions of the Organic Act of 1917, including the bill of rights that Act contained. Act of July 3, 1950, c. 446, § 5, 64 Stat. 320. The remainder became known as the Puerto Rican Federal Relations Act. § 4, 64 Stat. 319.

The question then arises whether Congress, by entering into the compact, intended to repeal by implication the jurisdiction of the Federal District Court of Puerto Rico to enforce 42 U. S. C. § 1983. We think not. As was observed in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S., at 671, the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union, and accordingly, Puerto Rico "now 'elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code.'" See generally Leibowitz, The Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219, 221 (1967); Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1 (1953); *Americana of Puerto Rico, Inc.* v. *Kaplus*, 368 F. 2d 431 (CA3 1966), cert. denied, 386 U. S. 943 (1967). More importantly, the provisions relating to the jurisdiction of a Federal District Court in Puerto Rico were left undisturbed, and there is no evidence in the legislative history that would support a determination that Congress intended such a departure.[26] In the

[26] Subsequent congressional legislation affecting the Federal District Court in Puerto Rico further confirms the conclusion that it possesses the same jurisdiction as that conferred on the federal district courts in the several States. By Pub. L. 89-571, 80 Stat. 764, the tenure of federal judges in Puerto Rico was made iden-

absence of a change in the language of the jurisdictional provision or of affirmative evidence in the legislative history, we are unwilling to read into the 1952 legislation a restriction of the jurisdiction of the Federal District Court.

C. Our conclusion not to attribute to Congress an inclination to leave the protection of federal rights exclusively to the local Puerto Rico courts is supported by *District of Columbia* v. *Carter*, 409 U. S. 418 (1973). There the Court held that the District was neither a State nor a Territory within the meaning of 42 U. S. C. § 1983. The District, it was observed, occupies a unique status within our system of government. It is the seat of the National Government, and, at the time the Civil Rights Act of 1871 was enacted, Congress exercised plenary power over its activities. These geographical and political considerations, as well as "the absence of any indication in the language, purposes, or history of § 1983 of a legislative intent to include the District within the scope of its coverage," supported the Court's conclusion. 409 U. S., at 432.

Appellants, however, focus upon the characterization of the District as "*sui generis* in our governmental structure," *ibid.*, and argue that because the Commonwealth of Puerto Rico is also *sui generis*, the conduct of persons acting under color of Commonwealth law is similarly

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tical to that of other United States district judges. The reason given for this amendment was that the Federal District Court in Puerto Rico "is in its jurisdiction, powers, and responsibilities the same as the U. S. district courts in the [several] States." S. Rep. No. 1504, 89th Cong., 2d Sess., 2 (1966); see also H. R. Rep. No. 135, 89th Cong., 1st Sess., 2–3 (1965).

The complete identity of the responsibility of these courts was effectuated in 1970, 84 Stat. 298, when Congress repealed § 41 of the Act of Mar. 2, 1917, 39 Stat. 965, in the context of providing additional United States district judges throughout the United States, including Puerto Rico.

exempted from scrutiny under § 1983.[27] We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history, but we think that it does not follow that Congress intended to relinquish federal enforcement of § 1983 by restricting the jurisdiction of the Federal District Court in Puerto Rico. It was observed in *Carter*, 409 U. S., at 427, that Congress, in enacting the civil rights legislation with which we are concerned, recognized that it "had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials," and that the "solution chosen was to involve the federal judiciary." Congress similarly lacked effective control over actions taken by territorial officials, although its authority to govern was plenary.[28] The same practical

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[27] Appellants' argument rests in large part on *Palmore* v. *United States*, 411 U. S. 389 (1973), where, following the rationale of *Fornaris* v. *Ridge Tool Co.*, 400 U. S., at 42 n. 1, the Court held that a statute of the District of Columbia was not a state statute for the purposes of 28 U. S. C. § 1257 (2). *Palmore* does not suggest, however, that the District of Columbia and Puerto Rico are to be treated identically in every respect. Indeed, there is no reason to hold such a view, particularly in light of the fact that the sources of congressional authority with respect to them are entirely different.

[28] "It is true, of course, that Congress also possessed plenary power over the Territories. For practical reasons, however, effective federal control over the activities of territorial officials was virtually impossible. Indeed, 'the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto. The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States. . . .' *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 546 (1962) . . . . Thus, although the Constitution vested control over the Territories in the Congress, its practical control was both 'confused and ineffective,' making the problem of

limitations on Congress' effectiveness to protect the federally guaranteed rights of the inhabitants of Puerto Rico existed from the time of its cession and, after 1952, when Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States, the need for federal protection of federal rights was not thereby lessened. Finally, § 1983, by its terms, applies to Territories; Puerto Rico, but not the District of Columbia, obviously was one of these. Whether Puerto Rico is now considered a Territory or a State, for purposes of the specific question before us, makes little difference because each is included within § 1983 and, therefore, 28 U. S. C. § 1343 (3).

It follows that the United States District Court for the District of Puerto Rico has jurisdiction under 28 U. S. C. § 1343 (3) to enforce the provisions of 42 U. S. C. § 1983.

III

Appellants, however, argue that the District Court should have abstained from reaching the merits of the constitutional claim. *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41 (1970), is cited as an example of abstention in a Puerto Rico context. We conclude that the District Court correctly determined that abstention was unnecessary. The case presents no novel question concerning the judicially created abstention doctrine; it requires, instead, only the application of settled principles reviewed just last Term in *Harris County Comm'rs Court* v. *Moore*, 420 U. S. 77 (1975).

Appellants urge that abstention was appropriate for

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enforcement of civil rights in the Territories more similar to the problem as it existed in the States than in the District of Columbia." *District of Columbia* v. *Carter*, 409 U. S., at 430–431 (footnotes omitted).

two reasons. First, it is said that § 689 should be construed by the commonwealth courts in the light of § 1483 of the Civil Code, P. R. Laws Ann., Tit. 31, § 4124 (1968). This provision imposes liability on a contractor for defective construction of a building. We fail to see, however, how § 4124 in any way could affect the interpretation of § 689 which imposes, with the exceptions that have been noted, a requirement of citizenship for the licensing of an engineer.

Appellants' second argument is that the commonwealth courts should be permitted to adjudicate the validity of the citizenship requirement in the light of §§ 1 and 7 of Art. II of the Puerto Rico Constitution. 1 P. R. Laws Ann., Const., Art. II, §§ 1, 7 (1965). Section 1 provides: "No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas." Section 7 provides: "No person in Puerto Rico shall be denied the equal protection of the laws." These constitutional provisions are not so interrelated with § 689 that it may be said, as in *Harris County*, that the law of the Commonwealth is ambiguous. Rather, the abstention issue seems clearly controlled by *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), where, as it was said in *Harris County*, 420 U. S., at 84–85, n. 8, "we declined to order abstention where the federal due process claim was not complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution." Indeed, to hold that abstention is required because § 689 might conflict with the cited broad and sweeping constitutional provisions, would convert abstention from an exception into a general rule.[29]

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[29] During oral argument appellants seemed to suggest, for the first time, that § 689 was ambiguous. Tr. of Oral Arg. 9, 36. This argument is directed to the exception in § 689 for aliens "who have

IV

This takes us, then, to the particular Puerto Rico statute before us. Does Puerto Rico's prohibition against an alien's engaging in the private practice of engineering deprive the appellee aliens of "any rights, privileges, or immunities secured by the Constitution and laws," within the meaning of 42 U. S. C. § 1983?

A. The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform. The nature of this country's relationship to Puerto Rico was vigorously debated within the Court as well as within the Congress.[30] See

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studied the total courses and have received their corresponding grade or certificate in the Commonwealth." The argument appears not to have been presented to the District Court. We conclude, also, that, for purposes of the present case, it is plainly without merit.

[30] In a series of decisions that have come to be known as the *Insular Cases,* the Court created the doctrine of incorporated and unincorporated Territories, *e. g., De Lima* v. *Bidwell,* 182 U. S. 1 (1901); *Dooley* v. *United States,* 182 U. S. 222 (1901); *Armstrong* v. *United States,* 182 U. S. 243 (1901); *Downes* v. *Bidwell,* 182 U. S. 244 (1901). The former category encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force. See, *e. g., Rassmussen* v. *United States,* 197 U. S. 516 (1905); but see *Hawaii* v. *Mankichi,* 190 U. S. 197 (1903). The latter category included those Territories not possessing that anticipation of statehood. As to them, only "fundamental" constitutional rights were guaranteed to the inhabitants. Although the question whether certain rights were or were not fundamental continued to provoke debate among the Members of the Court, it was clear that the Constitution was held not to extend *ex proprio vigore* to the inhabitants of Puerto Rico.

The most significant of the *Insular Cases* is *Downes* v. *Bidwell, supra,* where the Court held that the imposition by Congress of special duties on Puerto Rican goods did not violate the requirement of Const., Art. I, § 8, cl. 1, that "all Duties, Imposts and Excises shall be uniform throughout the United States."

The division of opinion in the Congress over how, and to what extent, the Constitution applied to Puerto Rico was reflected in the

Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Col. L. Rev. 823 (1926). It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico. The Court recognized the applicability of these guarantees as long ago as its decisions in *Downes* v. *Bidwell*, 182 U. S. 244, 283–284 (1901), and *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (1922). The principle was reaffirmed and strengthened in *Reid* v. *Covert*, 354 U. S. 1 (1957),[31] and then again in *Calero-Toledo*,

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Court's opinions in *Downes*. Mr. Justice Brown believed that the question was whether Congress had extended the Constitution to Puerto Rico; Mr. Justice White, with whom Justices McKenna and Shiras joined, propounded the theory of incorporated and unincorporated Territories; and Mr. Justice Gray was of the opinion that the question was essentially a political one to be left to the political branches of government. The Chief Justice, with whom Justices Harlan, Brewer, and Peckham joined, dissented on the ground that the Constitution applied to Puerto Rico *ex proprio vigore*. Mr. Justice White's approach in *Downes* v. *Bidwell* was eventually adopted by a unanimous Court in *Balzac* v. *Porto Rico*, 258 U. S., at 312–313.

Nor does it appear that the debate over the relationship of Puerto Rico to the United States has ended even now. See Note, Inventive Statesmanship vs. The Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers, 60 Va. L. Rev. 1041 (1974).

[31] The *Insular Cases* served as precedent for holdings that a civilian dependent of an American serviceman stationed abroad could be tried by an American court-martial for offenses committed in a foreign country. *Kinsella* v. *Krueger*, 351 U. S. 470 (1956); *Reid* v. *Covert*, 351 U. S. 487 (1956). The announcement in those cases that the Constitution applied with full force only in the States composing the Union and in incorporated Territories was overruled, however, only a year later when the Court granted petitions for rehearing, arrived at the opposite result, and withdrew the earlier opinions. *Reid* v. *Covert*, 354 U. S. 1 (1957).

416 U. S. 663 (1974), where we held that inhabitants of Puerto Rico are protected, under either the Fifth Amendment or the Fourteenth, from the official taking of property without due process of law.

The Court, however, thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection.[32] *Calero-Toledo,* 416 U. S., at 668–669, n. 5. Once again, we need not resolve that precise question because, irrespective of which Amendment applies, the statutory restriction on the ability of aliens to engage in the otherwise lawful private practice of civil engineering is plainly unconstitutional. If the Fourteenth Amendment is applicable, the Equal Protection Clause nullifies the statutory exclusion. If, on the other hand, it is the Fifth Amendment and its Due Process Clause that apply, the statute's discrimination is so egregious that it falls within the rule of *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).[33] See also *Schneider* v. *Rusk,* 377 U. S. 163, 168 (1964).

B. In examining the validity of Puerto Rico's virtually complete ban on the private practice of civil engineering by aliens, we apply the standards of our recent decisions in *Graham* v. *Richardson,* 403 U. S. 365 (1971); *Sugar-*

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[32] The United States Court of Appeals for the First Circuit, of which Puerto Rico is a part, 28 U. S. C. § 41, similarly has declined to make that determination. *E. g., Colon-Rosich* v. *Puerto Rico,* 256 F. 2d 393, 397 (1958); *Stagg, Mather & Hough* v. *Descartes,* 244 F. 2d 578, 583 (1957); *Mora* v. *Mejias,* 206 F. 2d 377, 382 (1953).

[33] "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." 347 U. S., at 499.

man v. *Dougall*, 413 U. S. 634 (1973); and *In re Griffiths*, 413 U. S. 717 (1973). These cases establish that state classifications based on alienage are subject to "strict judicial scrutiny." *Graham* v. *Richardson*, 403 U. S., at 376. Statutes containing classifications of this kind will be upheld only if the State or Territory imposing them is able to satisfy the burden of demonstrating "that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U. S., at 721–722 (footnotes omitted). These principles are applicable to the Puerto Rico statute now under consideration.

The underpinnings of the Court's constitutional decisions defining the circumstances under which state and local governments may favor citizens of this country by denying lawfully admitted aliens equal rights and opportunities have been two. The first, based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment and in the Due Process Clause of the Fifth Amendment, recognizes that "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U. S., at 372. See also *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 29 (1973); *Sugarman* v. *Dougall*, 413 U. S., at 642. The second, grounded in the Supremacy Clause, Const., Art. VI, cl. 2, and in the naturalization power, Art. I, § 8, cl. 4, recognizes the Federal Government's primary responsibility in the field of immigration and naturalization. See, *e. g.*, *Hines* v. *Davidowitz*, 312 U. S. 52, 66 (1941); *Truax* v. *Raich*, 239 U. S. 33, 42 (1915). See also *Graham* v. *Richardson*, 403 U. S., at 378; *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 419 (1948).

Official discrimination against lawfully admitted aliens traditionally has taken several forms. Aliens have been prohibited from enjoying public resources or receiving public benefits on the same basis as citizens. See *Graham* v. *Richardson, supra; Takahashi* v. *Fish & Game Comm'n, supra.* Aliens have been excluded from public employment. *Sugarman* v. *Dougall, supra.* See M. Konvitz, The Alien and the Asiatic in American Law, c. 6 (1946). And aliens have been restricted from engaging in private enterprises and occupations that are otherwise lawful. See *In re Griffiths, supra; Truax* v. *Raich, supra; Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (1886).[34]

The present Puerto Rico statute, of course, falls into the last category. It is with respect to this kind of discrimination that the States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible, and that the discrimination is necessary for the safeguarding of those interests. Thus, in *Yick Wo* v. *Hopkins* the Court struck down an ordinance that was administered so as to exclude aliens from pursuing the lawful occupation of a laundry. In *Truax* v. *Raich* the Court invalidated a state statute that required a private employer, having five or more workers, to employ at least 80% qualified electors or native-born citizens. And in *In re Griffiths* a state statutory requirement prescribing United States citizenship as a condition for engaging in the practice of law was held unconstitutional. But see *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392 (1927).

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[34] States also have placed restrictions on the devolution of real property to aliens, see *Hauenstein* v. *Lynham,* 100 U. S. 483 (1880); *Blythe* v. *Hinckley,* 180 U. S. 333 (1901), and have denied them equal rights and opportunities to acquire and own land, see *Terrace* v. *Thompson,* 263 U. S. 197 (1923); *Oyama* v. *California,* 332 U. S. 633 (1948).

The reason for this solicitude with respect to an alien's engaging in an otherwise lawful occupation is apparent:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Truax* v. *Raich,* 239 U. S., at 41 (citations omitted).

It is true that in *Truax* the Court drew a distinction between discrimination against aliens in private lawful occupations and discrimination against them where, it might be said, the State has a special interest in affording protection to its own citizens. *Id.,* at 39–40. That distinction, however, is no longer so sharp as it then was. Recently the Court has taken a more restrictive view of the powers of a State to discriminate against noncitizens with respect to public employment, compare *Crane* v. *New York,* 239 U. S. 195 (1915), aff'g *People* v. *Crane,* 214 N. Y. 154, 108 N. E. 427, and *Heim* v. *McCall,* 239 U. S. 175 (1915), with *Sugarman* v. *Dougall, supra;* and with respect to the distribution of public funds and the allocation of public resources, compare *McCready* v. *Virginia,* 94 U. S. 391 (1877), and *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914), with *Graham* v. *Richardson, supra,* and *Takahashi* v. *Fish & Game Comm'n, supra.*

We do not suggest, however, that a State, Territory, or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake

of public resources on the same basis as citizens. In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.

In the present case the appellants have offered three justifications for Puerto Rico's almost total ban on aliens' engaging in the private practice of engineering: The first is to prevent the "uncontrolled" influx of Spanish-speaking aliens into the field in Puerto Rico. The second is to raise the prevailing low standard of living. The third is to provide the client of a civil engineer an assurance of financial accountability if a building for which the engineer is responsible collapses within 10 years of construction. P. R. Laws Ann., Tit. 31, § 4124 (1968).

The first justification amounts to little more than an assertion that discrimination may be justified by a desire to discriminate. This interest is unpersuasive on its face. It is also at odds with the Federal Government's primary power and responsibility for the regulation of immigration. Once an alien is lawfully admitted, a State may not justify the restriction of the alien's liberty on the ground that it wishes to control the impact or effect of federal immigration laws. Cf. *DeCanas* v. *Bica,* 424 U. S. 351 (1976).

Although the second broad justification proffered by the appellants has elements of substance and legitimacy, the means drawn to achieve the end are neither necessary nor precise. What the Commonwealth has done by its statute is to require private employers and contractors to hire only engineers who are American citizens. This end was held impermissible over 50 years ago in *Truax* v. *Raich, supra.* To uphold the statute on the basis of broad economic justification of this kind would permit

any State to bar the employment of aliens in any or all lawful occupations.

Finally, the asserted purpose to assure responsibility for negligent workmanship sweeps too broadly. United States citizenship is not a guarantee that a civil engineer will continue to reside in Puerto Rico or even in the United States, and it bears no particular or rational relationship to skill, competence, or financial responsibility. See *Sugarman* v. *Dougall*, 413 U. S., at 645; *In re Griffiths*, 413 U. S., at 724. Puerto Rico has available to it other ample tools to achieve the goal of an engineer's financial responsibility without indiscriminately prohibiting the private practice of civil engineering by a class of otherwise qualified professionals.

The judgments of the District Court are affirmed.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST, dissenting in part.

I agree with the Court's conclusion that the United States District Court for the District of Puerto Rico had jurisdiction of appellees' claim under 28 U. S. C. § 1343 (3), and that it was not obligated to abstain from reaching the merits of that claim. I believe that I have some understanding of the difficulties which the Court necessarily encounters in then determining whether either the Fifth Amendment or the Fourteenth Amendment to the United States Constitution applies to Puerto Rico. But without attempting to recapitulate the doctrine of the cases from *Downes* v. *Bidwell*, 182 U. S. 244 (1901), to *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974), I do not think the inquiry lends itself to the facile "either-or" answer upon which the Court ultimately settles.

The Fourteenth Amendment is by its terms applicable to States: Puerto Rico is not a State. Doubtless constitutional inquiries shrouded as this one is in both history and case law cannot be definitively answered so simply as this, but I would be inclined to reject the claim that the Fourteenth Amendment is applicable to Puerto Rico until a case sufficiently strong to overcome this "plain meaning" obstacle, found in the language of the Amendment itself, is made out.*

The Fifth Amendment, of course, applies to Congress, and had this statute been enacted by Congress it would be subject to the strictures of the Fifth Amendment. But just as certainly it was not enacted by Congress, but by the Legislature of Puerto Rico. I could perhaps understand in this regard a theory that under the Foraker Act, which reserved to Congress the right to annul laws of the Puerto Rican Legislature with which it disagreed, see *ante,* at 586 n. 16, that legislature should be treated as the delegate of Congress equally subject to the strictures of the Fifth Amendment. But any such theory would, of course, face very substantial obstacles in view of the fact that Congress subsequently provided in the Organic Act of 1917 a bill of rights, giving Puerto Ricans "*nearly all* the personal guarantees found in the United States Constitution." *Ante,* at 591 (emphasis supplied).

If the constitutional limitations expressly directed to Congress, such as the Fifth Amendment, also directly restrict the Puerto Rican Legislature by virtue of its being a delegate of Congress, it would not only have been superfluous for Congress to provide an additional bill of

*The wording of the Thirteenth Amendment shows that the Framers of the post-Civil War Amendments knew how to word those provisions where it was intended that their guarantees have application in all Territories of the United States rather than just as a limit upon the authority of *state* government.

rights; it would have been quite impossible for it to endow its delegate with more power to disregard individual liberties than it itself may possess. I would thus find it extremely difficult to see how constitutional limitations upon the power of Congress may be thought to apply *ex proprio vigore* to the power of the Puerto Rican Legislature. Moreover, following the passage of the Act of July 3, 1950, and Puerto Rico's acceptance of Commonwealth status, see *ante*, at 593–594, I would have thought that the only restrictions upon the elected Legislature of Puerto Rico were those embodied in the Constitution enacted as a condition of assuming that status or directly imposed by Congress by statute.

In short, I am not nearly as certain as the Court appears to be that either the Fifth Amendment or the Fourteenth Amendment must govern the acts of the Legislature of Puerto Rico. It seems to me it is quite possible that neither provision operates as a direct limitation upon the authority of that elected body. Even if I am wrong in this, I would not have thought it as easy as does the Court to avoid more focused inquiry in this case into which provision may be applicable. For even if a State could not, consistent with the Equal Protection Clause of the Fourteenth Amendment, pass the statute challenged by appellees, it surely does not follow that the Fifth Amendment's due process limitation upon the exercise of federal authority requires an identical conclusion. See *Hampton* v. *Mow Sun Wong*, *ante*, at 100–101. For if for some reason it were to be concluded that the restrictions placed upon the Federal Government were somehow directly applicable to the actions of appellants, it would seem that they would be able equivalently to assert whatever additional authority that Government possesses with regard to aliens. Indeed, rejection of this approach would raise an even more

difficult question: Why should a restriction upon the authority of the Government of the United States, which may be thought of as granting concomitant rights to *United States citizens,* have any bearing upon how the people of a Territory of the United States may deal with *aliens* within their Territory?

If the answers to these questions were dispositive of my vote in this case, I would feel compelled to explore them in much more detail than does the Court today. But even if I were to conclude that one part of the Court's either/or assumption was correct, I could not agree with the result which it believes is compelled by that assumption. I do not agree either that the statute in question violates the Equal Protection Clause of the Fourteenth Amendment, for the reasons stated in my dissent in *Sugarman* v. *Dougall,* 413 U. S. 634, 649 (1973), or that if the statute were subject to the limitations of the Fifth Amendment, it is infirm by reason of their application. *Hampton* v. *Mow Sun Wong, ante,* p. 117 (REHNQUIST, J., dissenting). I would therefore reverse the decision of the District Court.

DOYLE *v.* OHIO

CERTIORARI TO THE COURT OF APPEALS OF OHIO, TUSCARAWAS COUNTY

No. 75-5014. Argued February 23, 1976—Decided June 17, 1976*

During the course of their state criminal trials petitioners, who after arrest were given warnings in line with *Miranda* v. *Arizona*, 384 U. S. 436, 467–473, took the stand and gave an exculpatory story that they had not previously told to the police or the prosecutor. Over their counsel's objection, they were cross-examined as to why they had not given the arresting officer the exculpatory explanations. Petitioners were convicted, and their convictions were upheld on appeal. *Held:* The use for impeachment purposes of petitioners' silence, at the time of arrest and after they received *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. Post-arrest silence following such warnings is insolubly ambiguous; moreover, it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured, by the *Miranda* warnings, that silence would carry no penalty. Pp. 616–620.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 620.

James R. Willis argued the cause for petitioners and filed briefs in both cases.

Ronald L. Collins argued the cause *pro hac vice* and filed a brief for respondent in both cases.†

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*Together with No. 75-5015, *Wood* v. *Ohio*, also on certiorari to the same court.

†*Solicitor General Bork* filed a brief for the United States as *amicus curiae*.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in these consolidated cases is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings [1] at the time of his arrest. We conclude that use of the defendant's post-arrest silence in this manner violates due process, and therefore reverse the convictions of both petitioners.

I

Petitioners Doyle and Wood were arrested together and charged with selling 10 pounds of marihuana to a local narcotics bureau informant. They were convicted in the Common Pleas Court of Tuscarawas County, Ohio, in separate trials held about one week apart. The evidence at their trials was identical in all material respects.

The State's witnesses sketched a picture of a routine marihuana transaction. William Bonnell, a well-known "street person" with a long criminal record, offered to assist the local narcotics investigation unit in setting up drug "pushers" in return for support in his efforts to receive lenient treatment in his latest legal problems. The narcotics agents agreed. A short time later, Bonnell advised the unit that he had arranged a "buy" of 10 pounds of marihuana and needed $1,750 to pay for it. Since the banks were closed and time was short, the agents were able to collect only $1,320. Bonnell took this money and left for the rendezvous, under surveillance by four narcotics agents in two cars. As planned, he met petitioners in a bar in Dover, Ohio. From there, he and petitioner Wood drove in Bonnell's

[1] *Miranda* v. *Arizona*, 384 U. S. 436, 467–473 (1966).

pickup truck to the nearby town of New Philadelphia, Ohio, while petitioner Doyle drove off to obtain the marihuana and then meet them at a prearranged location in New Philadelphia. The narcotics agents followed the Bonnell truck. When Doyle arrived at Bonnell's waiting truck in New Philadelphia, the two vehicles proceeded to a parking lot where the transaction took place. Bonnell left in his truck, and Doyle and Wood departed in Doyle's car. They quickly discovered that they had been paid $430 less than the agreed-upon price, and began circling the neighborhood looking for Bonnell. They were stopped within minutes by New Philadelphia police acting on radioed instructions from the narcotics agents. One of those agents, Kenneth Beamer, arrived on the scene promptly, arrested petitioners, and gave them *Miranda* warnings. A search of the car, authorized by warrant, uncovered the $1,320.

At both trials, defense counsel's cross-examination of the participating narcotics agents was aimed primarily at establishing that, due to a limited view of the parking lot, none of them had seen the actual transaction but had seen only Bonnell standing next to Doyle's car with a package under his arm, presumably after the transaction.[2] Each petitioner took the stand at his trial and admitted practically everything about the State's case except the most crucial point: who was

[2] Defense counsel's efforts were not totally successful. One of the four narcotics agents testified at both trials that he had seen the package passed through the window of Doyle's car to Bonnell. In an effort to impeach that testimony, defense counsel played a tape of the preliminary hearing at which the same agent had testified only to seeing the package under Bonnell's arm. The agent did not retract his trial testimony, and both he and the prosecutor explained the apparent inconsistency by noting that the examination at the preliminary hearing had not focused upon whether anyone had seen the package pass to Bonnell.

selling marihuana to whom. According to petitioners, Bonnell had framed them. The arrangement had been for Bonnell to sell Doyle 10 pounds of marihuana. Doyle had left the Dover bar for the purpose of borrowing the necessary money, but while driving by himself had decided that he only wanted one or two pounds instead of the agreed-upon 10 pounds. When Bonnell reached Doyle's car in the New Philadelphia parking lot, with the marihuana under his arm, Doyle tried to explain his change of mind. Bonnell grew angry, threw the $1,320 into Doyle's car, and took all 10 pounds of the marihuana back to his truck. The ensuing chase was the effort of Wood and Doyle to catch Bonnell to find out what the $1,320 was all about.

Petitioners' explanation of the events presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict it.[3] As part of a wide-ranging cross-examination for impeachment purposes, and in an effort to undercut the explanation, the prosecutor asked each petitioner at his respective trial why he had not told the frameup story to Agent Beamer when he arrested petitioners. In the first trial, that of petitioner Wood, the following colloquy occurred:[4]

> "Q. [By the prosecutor.] Mr. Beamer did arrive on the scene?
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> "A. [By Wood.] Yes, he did.
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> "Q. And I assume you told him all about what happened to you?
>
> . . . . .
>
> "A. No.

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[3] See n. 2, *supra*.

[4] Trial transcript in *Ohio* v. *Wood*, No. 10657, Common Pleas Court, Tuscarawas County, Ohio (hereafter Wood Tr.), 465–470.

"Q. You didn't tell Mr. Beamer?

. . . . .

"A. No.

"Q. You didn't tell Mr. Beamer this guy put $1,300 in your car?

. . . . .

"A. No, sir.

"Q. And we can't understand any reason why anyone would put money in your car and you were chasing him around town and trying to give it back?

. . . . .

"A. I didn't understand that.

"Q. You mean you didn't tell him that?

. . . . .

"A. Tell him what?

. . . . .

"Q. Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?

. . . . .

"Q. But in any event you didn't bother to tell Mr. Beamer anything about this?

"A. No, sir."

Defense counsel's timely objections to the above questions of the prosecutor were overruled. The cross-examination of petitioner Doyle at his trial contained a similar exchange, and again defense counsel's timely objections were overruled.[5]

[5] Trial transcript in *Ohio* v. *Doyle*, No. 10656, Common Pleas Court, Tuscarawas County, Ohio (hereafter Doyle Tr.), 504–507:

"Q. [By the prosecutor.] . . . You are innocent?

"A. [By Doyle.] I am innocent. Yes Sir.

"Q. That's why you told the police department and Kenneth Beamer when they arrived—

. . . . .

Each petitioner appealed to the Court of Appeals, Fifth District, Tuscarawas County, alleging, *inter alia,* that the trial court erred in allowing the prosecutor to cross-examine the petitioner at his trial about his post-arrest silence. The Court of Appeals affirmed the convictions, stating as to the contentions about the post-arrest silence:

> "This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination

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"(Continuing.)—about your innocence?

. . . . . .

"A. . . . I didn't tell them about my innocence. No.

"Q. You said nothing at all about how you had been set up?

. . . . . .

"Q. Did Mr. Wood?

"A. Not that I recall, Sir.

. . . . . .

"Q. As a matter of fact, if I recall your testimony correctly, you said instead of protesting your innocence, as you do today, you said in response to a question of Mr. Beamer,—'I don't know what you are talking about.'

"A. I believe what I said,—'What's this all about?' If I remember, that's the only thing I said.

. . . . . .

"A. I was questioning, you know, what it was about. That's what I didn't know. I knew that I was trying to buy, which was wrong, but I didn't know what was going on. I didn't know that Bill Bonnell was trying to frame me, or what-have-you.

. . . . . .

"Q. All right,—But you didn't protest your innocence at that time?

. . . . . .

"A. Not until I knew what was going on."

In addition, the court in both trials permitted the prosecutor, over more objections, to argue petitioners' post-arrest silence to the jury. Closing Argument of Prosecutor 13–14, supplementing Wood Tr.; Doyle Tr. 515, 526.

> of a witness as to why he had not told the same story earlier at his first opportunity.
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> "We find no error in this. It goes to credibility of the witness."

The Supreme Court of Ohio denied further review. We granted certiorari to decide whether impeachment use of a defendant's post-arrest silence violates any provision of the Constitution,[6] a question left open last Term in *United States* v. *Hale*, 422 U. S. 171 (1975), and on which the Federal Courts of Appeals are in conflict. See *id.*, at 173 n. 2.

II

The State pleads necessity as justification for the prosecutor's action in these cases. It argues that the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings. Noting that the prosecution usually has little else with which to counter such an exculpatory story, the State seeks only the right to cross-examine a defendant as to post-arrest silence for the limited purpose of impeachment. In support of its position the State emphasizes the importance of cross-

[6] Petitioners also claim constitutional error because each of them was cross-examined by the prosecutor as to why he had not told the exculpatory story at the preliminary hearing or any other time prior to the trials. In addition, error of constitutional dimension is asserted because each petitioner was cross-examined as to post-arrest, preliminary hearing, and general pretrial silence when he testified as a *defense witness* at the other petitioner's trial. These averments of error present different considerations from those implicated by cross-examining petitioners as defendants as to their silence after receiving *Miranda* warnings at the time of arrest. In view of our disposition of this case we find it unnecessary to reach these additional issues.

examination in general, see *Brown* v. *United States,* 356 U. S. 148, 154–155 (1958), and relies upon those cases in which this Court has permitted use for impeachment purposes of post-arrest statements that were inadmissible as evidence of guilt because of an officer's failure to follow *Miranda*'s dictates. *Harris* v. *New York,* 401 U. S. 222 (1971); *Oregon* v. *Hass,* 420 U. S. 714 (1975); see also *Walder* v. *United States,* 347 U. S. 62 (1954). Thus, although the State does not suggest petitioners' silence could be used as evidence of guilt, it contends that the need to present to the jury all information relevant to the truth of petitioners' exculpatory story fully justifies the cross-examination that is at issue.

Despite the importance of cross-examination,[7] we have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, see *Michigan* v. *Tucker,* 417 U. S. 433, 443–444 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.[8] See *United States* v. *Hale, supra,*

[7] We recognize, of course, that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge. See generally *Fitzpatrick* v. *United States,* 178 U. S. 304, 315 (1900).

[8] The dissent by MR. JUSTICE STEVENS expresses the view that the giving of *Miranda* warnings does not lessen the "probative value of [a defendant's] silence . . . ." *Post,* at 621. But in *United*

at 177. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.[9]

States v. *Hale*, 422 U. S. 171, 177 (1975), we noted that silence at the time of arrest may be inherently ambiguous even apart from the effect of *Miranda* warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation. In *Hale* we exercised our supervisory powers over federal courts. The instant cases, unlike *Hale*, come to us from a state court and thus provide no occasion for the exercise of our supervisory powers. Nor is it necessary, in view of our holding above, to express an opinion on the probative value for impeachment purposes of petitioners' silence. We note only that the *Hale* court considered silence at the time of arrest likely to be ambiguous and thus of dubious probative value.

[9] A somewhat analogous situation was presented in *Johnson* v. *United States*, 318 U. S. 189 (1943). A defendant who testified at his trial was permitted by the trial judge to invoke the Fifth Amendment privilege against self-incrimination in response to certain questions on cross-examination. This Court assumed that it would not have been error for the trial court to have denied the privilege in the circumstances, see *id.*, at 196, in which case a failure to answer would have been a proper basis for adverse inferences and a proper subject for prosecutorial comment. But because the privilege had been granted, even if erroneously, "the requirements of fair trial" made it error for the trial court to permit comment upon the defendant's silence. *Ibid.*

"An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. . . . Elementary fairness requires that an accused should not be misled on that score." *Id.*, at 197.

Johnson was decided under this Court's supervisory powers over the federal courts. But the necessity for elementary fairness is not

MR. JUSTICE WHITE, concurring in the judgment in *United States* v. *Hale, supra,* at 182–183, put it very well:

> "[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case." [10]

We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.[11] The State has not

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unique to the federal criminal system. Cf. *Raley* v. *Ohio,* 360 U. S. 423, 437–440 (1959).

[10] The dissenting opinion relies on the fact that petitioners in this case, when cross-examined about their silence, did not offer reliance on *Miranda* warnings as a justification. But the error we perceive lies in the cross-examination on this question, thereby implying an inconsistency that the jury might construe as evidence of guilt. After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.

[11] It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told

claimed that such use in the circumstances of this case might have been harmless error. Accordingly, petitioners' convictions are reversed and their causes remanded to the state courts for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

Petitioners assert that the prosecutor's cross-examination about their failure to mention the purported "frame" until they testified at trial violated their constitutional right to due process and also their constitutional privilege against self-incrimination. I am not persuaded by the first argument; though there is merit in a portion of the second, I do not believe it warrants reversal of these state convictions.

I

The Court's due process rationale has some of the characteristics of an estoppel theory. If (a) the defendant is advised that he may remain silent, and (b) he does remain silent, then we (c) presume that his decision was made in reliance on the advice, and (d) conclude that it is unfair in certain cases, though not others,[1] to use his silence to impeach his trial testimony. The key to the Court's analysis is apparently a concern that the *Miranda* warning, which is intended to increase the prob-

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the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf. *United States* v. *Fairchild*, 505 F. 2d 1378, 1383 (CA5 1975).

[1] As the Court acknowledges, the "fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Ante*, at 619 and this page, n. 11.

ability that a person's response to police questioning will be intelligent and voluntary, will actually be deceptive unless we require the State to honor an unstated promise not to use the accused's silence against him.

In my judgment there is nothing deceptive or prejudicial to the defendant in the *Miranda* warning.[2] Nor do I believe that the fact that such advice was given to the defendant lessens the probative value of his silence, or makes the prosecutor's cross-examination about his silence any more unfair than if he had received no such warning.

This is a case in which the defendants' silence at the time of their arrest was graphically inconsistent with their trial testimony that they were the unwitting victims of a "frameup" in which the police did not participate. If defendants had been framed, their failure to mention that fact at the time of their arrest is almost

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[2] At Wood's trial, the arresting officer described the warning he gave petitioners:

"I told Mr. Wood and Mr. Doyle of the Miranda warning rights—they had the right to remain silent, anything they said could and would be used against them in a court of law, and they had the right to an attorney and didn't have to say anything without an attorney being present and if they couldn't afford one, the court would appoint them one at the proper time." Trial transcript in *Ohio* v. *Wood,* No. 10657, Common Pleas Court, Tuscarawas County, Ohio (hereafter Wood Tr.), 126. At the Doyle trial, he testified that he "gave them their rights" and gave them a " 'Miranda Warning.' " Trial transcript in *Ohio* v. *Doyle,* No. 10656, Common Pleas Court, Tuscarawas County, Ohio (hereafter Doyle Tr.), 269. *Miranda* v. *Arizona,* 384 U. S. 436, requires the following warning:

"[The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.,* at 479.

inexplicable; for that reason, under accepted rules of evidence, their silence is tantamount to a prior inconsistent statement and admissible for purposes of impeachment.[3]

Indeed, there is irony in the fact that the *Miranda* warning provides the only plausible explanation for their silence. If it were the true explanation, I should think that they would have responded to the questions on cross-examination about why they had remained silent by stating that they relied on their understanding of the advice given by the arresting officers. Instead, however, they gave quite a different jumble of responses.[4] Those

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[3] 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970).

[4] Petitioner Doyle gave the following testimony on direct and cross-examination at his trial:

"Q. [By defense counsel.] And you were placed under arrest at that time?

"A. [By Doyle.] Yes. I asked what for and he said,—'For the sale of marijuana.' I told him,—I didn't know what he was talking about.

. . . . . .

"Q. [By the prosecutor.] As a matter of fact, if I recall your testimony correctly, you said instead of protesting your innocence, as you do today, you said in response to a question of Mr. Beamer,—'I don't know what you are talking about.'

"A. [By Doyle.] I believe what I said,—'What's this all about?' If I remember, that's the only thing I said.

"Q. You testified on direct.

"A. If I did, then I didn't understand.

". . . I was questioning, you know, what it was about. That's what I didn't know. I knew that I was trying to buy, which was wrong, but I didn't know what was going on. I didn't know that Bill Bonnell was trying to frame me, or what-have-you.

. . . . . .

"Q. All right,—But you didn't protest your innocence at that time?

. . . . . .

responses negate the Court's presumption that their silence was induced by reliance on deceptive advice. Since the record requires us to put to one side the

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"A. Not until I knew what was going on." Doyle Tr. 479, 506–507.

At Wood's trial, Doyle gave a somewhat different explanation of his silence at the time of arrest:

"Q. [By the prosecutor.] Why didn't [Wood] tell [the police officers] about Mr. Bonnell?

"A. [By Doyle.] Because we didn't know what was going on and wanted to find out.

"Q. So he hid the money under the mat?

"A. The police officers said they stopped us for a red light. I wanted to get my hands on Bill Bonnell.

"Q. It wasn't because you were guilty, was it?

"A. Because I wanted to get my hands on Bill Bonnell because I suspected he was trying . . .

"Q. Why didn't you tell the police that Bill Bonnell just set you up?

"A. Because I would rather have my own hands on him.

. . . . . .

"Q. When Mr. Beamer arrived?

"A. . . . [W]hen Mr. Beamer got there I said to Mr. Beamer what the hell is all this about and he said you are under arrest for the suspicion of selling marijuana and I said you got to be crazy. I was pretty upset.

. . . . . .

"Q. So on the night of April 29 you felt that you were being framed like you are being framed today?

"A. I was so confused that night, the night of the arrest.

"Q. How about Mr. Wood?

"A. Mr. Wood didn't know what was going on.

. . . . . .

"Q. . . . Are you as mad and upset today as you were that night?

"A. I can't answer that question.

"Q. Did you feel the same way about what happened to you?

"A. That night I felt like I couldn't believe what was happening.

"Q. You didn't like being framed?

Court's presumption that the defendants' silence was the product of reliance on the *Miranda* warning, the Court's entire due process rationale collapses. For without re-

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"A. That is right. I didn't like some one putting me in a spot like that.

"Q. Didn't it occur to you to try to protect yourself?

"A. Yes, at this time I felt like I wasn't talking to nobody but John James who was the attorney at that time.

"Q. But you felt . . .

"A. The man walked up and didn't ask me anything.

"Q. You didn't talk to a soul about how rotten it was because you were framed?

. . . . . .

"A. I will answer the question, sir, the best I can. I didn't know what to say. I was stunned about what was going on and I was asked questions and I answered the questions as simply as I could because I didn't have nobody there to help me answer the questions.

"Q. Wouldn't that have been a marvelous time to protest your innocence?

. . . . . .

"A. I don't know if it would or not.

"Q. Do you remember having a conversation with Kenneth Beamer?

"A. Yes, sir.

"Q. What was said?

. . . . . .

"A. Kenneth Beamer said I want to know where you stash—where your hide out is, where you are keeping the dope and I said I don't know what you are talking about. I believe the question was asked in front of you.

"Q. Where did this conversation take place?

"A. Took place during the search.

. . . . . .

"Q. So any way you didn't tell anyone how angry you were that night?

. . . . . .

"A. I was very angry.

"Q. But you didn't tell anyone?

liance on the waiver, the case is no different than if no warning had been given, and nothing in the Court's opinion suggests that there would be any unfairness in

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"A. That is right. If I started I don't know where I would have stopped. I was upset." Wood Tr. 424–430.

Petitioner Wood testified on cross-examination at his trial as follows:

"Q. [By the prosecutor.] Jefferson Doyle said he was confused, angry and upset [at the time of the arrest]. Were you confused, angry and upset?

. . . . . .

"A. [By Wood.] Upset and confused.

"Q. Why were you upset?

"A. Because I didn't know what was going on most of the time.

"Q. Why would you be upset? Because you found $1300 in your back seat?

"A. Mainly because the person that was in the car Jeff [Doyle] was upset confused and angry and . . .

"Q. What has that to do with you?

"A. I am in the car. That is what it has to do with me.

. . . . . .

"Q. You are innocent?

"A. Yes.

"Q. Of anything?

"A. I don't know about anything.

"Q. This particular incident, you were placed under arrest, weren't you?

"A. Yes, innocent of this incident.

"Q. Innocent of the entire transaction?

"A. Yes, sir.

"Q. Or even any knowledge of the entire transaction?

"A. Up to a point, sir.

. . . . . .

"Q. Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?

. . . . . .

"A. Mr. Cunningham, in the last eight months to a year there has been so many implications, etc. in the paper and law enforcement that are setting people up and busting them for narcotics and stuff." Wood Tr. 467–469.

using petitioners' prior inconsistent silence for impeachment purposes in such a case.

Indeed, as a general proposition, if we assume the defendant's silence would be admissible for impeachment purposes if no *Miranda* warning had been given, I should think that the warning would have a tendency to salvage the defendant's credibility as a witness. If the defendant is a truthful witness, and if his silence is the consequence of his understanding of the *Miranda* warning, he may explain that fact when he is on the stand. Even if he is untruthful, the availability of that explanation puts him in a better position than if he had received no warning. In my judgment, the risk that a truthful defendant will be deceived by the *Miranda* warning and also will be unable to explain his honest misunderstanding is so much less than the risk that exclusion of the evidence will merely provide a shield for perjury that I cannot accept the Court's due process rationale.

Accordingly, if we assume that the use of a defendant's silence for impeachment purposes would be otherwise unobjectionable, I find no merit in the notion that he is denied due process of law because he received a *Miranda* warning.

II

Petitioners argue that the State violated their Fifth Amendment privilege against self-incrimination by asking the jury to draw an inference of guilt from their constitutionally protected silence. They challenge both the prosecutor's cross-examination and his closing argument.

A

Petitioners claim that the cross-examination was improper because it referred to their silence at the time of

their arrest, to their failure to testify at the preliminary hearing, and to their failure to reveal the "frame" prior to trial. Their claim applies to the testimony of each defendant at his own trial, and also to the testimony each gave as a witness at the trial of the other. Since I think it quite clear that a defendant may not object to the violation of another person's privilege,[5] I shall only discuss the argument that a defendant may not be cross-examined about his own prior inconsistent silence.

In support of their objections to the cross-examination about their silence at the time of arrest, petitioners primarily rely on the statement in *Miranda* v. *Arizona*, 384 U. S. 436, that the prosecution may not use at trial the fact that the defendant stood mute or claimed the privilege in the face of accusations during custodial interrogation.[6] There are two reasons why that statement does not adequately support petitioners' argument.

First, it is not accurate to say that the petitioners "stood mute or claimed the privilege in the face of accusations." Neither petitioner claimed the privilege and

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[5] See *Massiah* v. *United States*, 377 U. S. 201, 206–207; 8 J. Wigmore, Evidence § 2270, pp. 416–417 (McNaughton rev. 1961); cf. *Alderman* v. *United States*, 394 U. S. 165, 174. Cross-examination and comment upon a witness' prior silence does not raise any inference prejudicial to the defendant, and indeed, does not even raise any inference that the defendant remained silent.

[6] "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1041–1044 (1966). See also *Bram* v. *United States*, 168 U. S. 532, 562 (1897)." 384 U. S., at 468 n. 37.

petitioner Doyle did not even remain silent.[7] The case is not one in which a description of the actual conversation between the defendants and the police would give rise to any inference of guilt if it were not so flagrantly inconsistent with their trial testimony. Rather than a claim of privilege, we simply have a failure to advise the police of a "frame" at a time when it most surely would have been mentioned if petitioners' trial testimony were true. That failure gave rise to an inference of guilt only because it belied their trial testimony.

Second, the dictum in the footnote in *Miranda* relies primarily upon *Griffin* v. *California*, 380 U. S. 609, which held that the Fifth Amendment, as incorporated in the Fourteenth, prohibited the prosecution's use of the defendant's silence in its case in chief. But as long ago as *Raffel* v. *United States*, 271 U. S. 494, this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes. *Raffel* expressly held that the defendant's silence at a prior trial was admissible for purposes of impeachment despite the application in federal prosecutions of the prohibition that *Griffin* found in the Fifth Amendment. *Raffel, supra*, at 496–497.

Moreover, Mr. Chief Justice Warren, the author of the Court's opinion in *Miranda*, joined the opinion in *Walder* v. *United States*, 347 U. S. 62, which squarely held that a valid constitutional objection to the admissibility of evidence as part of the Government's case in chief did not bar the use of that evidence to impeach the defendant's trial testimony. The availability of an objection to the affirmative use of improper evidence does not provide the defendant "with a shield against contradiction of his untruths." *Id.*, at 65. The need to ensure the integrity

[7] See n. 4, *supra*.

of the truth-determining function of the adversary trial process has provided the predicate for an unbroken line of decisions so holding.[8]

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[8] As the Court recently recognized in a most carefully considered opinion, an adversary system can maintain neither the reality nor the appearance of efficacy without the assurance that its judgments rest upon a complete illumination of a case rather than upon "a partial or speculative presentation of the facts." *United States* v. *Nixon*, 418 U. S. 683, 709. The necessity of insuring a complete presentation of all relevant evidence has led to the rule that a criminal defendant who voluntarily forgoes his privilege not to testify, and presents exculpatory or mitigating evidence, thereby subjects himself to relevant cross-examination without the right to reclaim Fifth Amendment protection on a selective basis. *Fitzpatrick* v. *United States*, 178 U. S. 304, 315.

"If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. '[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.'" *Brown* v. *United States*, 356 U. S. 148, 154–155 (citation omitted).

One need not impute perjury to an entire class to acknowledge that a testifying defendant has more to gain and less to lose than an ordinary witness from fabrications upon the witness stand. Cf. *Reagan* v. *United States*, 157 U. S. 301, 304–311; *Taylor* v. *United States*, 390 F. 2d 278, 284–285 (CA8 1968) (Blackmun, J.). As the Court notes today: "Unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Ante*, at 617 n. 7. In recognition of this fact, this Court has allowed evidence to be used for impeachment purposes that would be inadmissible as evidence of guilt. In *Walder* v. *United States*, 347 U. S. 62, evidence of narcotics unlawfully seized in connection with an aborted earlier case against a defendant was held admissible for the limited purpose of impeaching the defendant's testimony that he never had been associated with narcotics, although such evidence clearly was inadmissible for any purpose in the prosecution's case in chief. In *Harris* v. *New York*, 401 U. S. 222, the Court held admis-

Although I have no doubt concerning the propriety of the cross-examination about petitioners' failure to mention the purported "frame" at the time of their arrest, a more difficult question is presented by their objection to the questioning about their failure to testify at the preliminary hearing and their failure generally to mention the "frame" before trial.[9] Unlike the failure

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sible for the purpose of impeaching a defendant's testimony certain partially inconsistent post-arrest statements which, although voluntary, were unavailable for the prosecution's case because they had been given by the defendant without benefit of *Miranda* warnings. And last Term, in a decision closely analogous to *Harris*, the Court held admissible for impeachment purposes post-arrest statements of a defendant made after he had received *Miranda* warnings and exercised his right to request a lawyer, but before he had been furnished with counsel as *Miranda* requires in such circumstances. *Oregon* v. *Hass*, 420 U. S. 714.

In each of these cases involving impeachment cross-examination, the need to insure the integrity of the trial by the "traditional truth-testing devices of the adversary process," *Harris* v. *New York*, *supra*, at 225, was deemed to outweigh the policies underlying the relevant exclusionary rules.

[9] Petitioner Doyle was cross-examined as follows at his trial:

"Q. [By the prosecutor.] All right. Do you remember the Preliminary Hearing in this case?

"A. [By Doyle.] Yes Sir. I remember it.

"Q. And that was prior to your indictment for this offense, was it not?

"A. Yes sir. I believe,—Yes Sir, it was before I was indicted.

"Q. Arraignment. Is that what you mean?

"A. Yes. The next day after the arrest.

"Q. Yes, when evidence was presented and you had the opportunity to hear the testimony of the witnesses against you. Remember that?

"A. Yes Sir.

"Q. Mr. Bonnell testified; Captain Griffin testified; Deputy—Chief Deputy White testified?

"A. Yes Sir.

"Q. Kenneth Beamer testified?

"A. Yes Sir.

to make the kind of spontaneous comment that discovery of a "frame" would be expected to prompt, there is no significant inconsistency between petitioners' trial testi-

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"Q. You were there, weren't you?
"A. Yes Sir.
"Q. And your lawyer was there,—Mr. James?
"A. Yes Sir.
"Q. Tape recording was made of the transcript?
"A. Yes Sir.
"Q. Did you protest your innocence at that proceeding?
. . . . .
"A. I didn't—everything that was done with that was done with my attorney. My attorney did it.
"Q. All right. The first time that you gave this version of the fact was in the trial of Richard Wood,—was it not?
. . . . .
"A. Yes Sir. It was the first time I was asked.
"Q. All the time, you being innocent?
"A. Yes Sir." Doyle Tr. 507–508.

Petitioner Wood was subjected to similar cross-examination at his trial:

"Q. [By the prosecutor.] As a matter of fact you never told anyone that you had been set up until today?
. . . . .
"A. [By Wood.] Yes, I believe I did, sir.
"Q. I assume you discussed it with your lawyer?
"A. Yes, I discussed it with my lawyer.
"Q. And you heard the testimony and witnesses against you?
"A. Yes, sir.
"Q. And were you aware Mr. James was able to obtain a tape transcript of the proceedings?
"A. Yes.
"Q. And you no doubt listened to those?
"A. Parts and portions of them—some of it.
"Q. But you never communicated your innocence?
"A. I believe I did one time to Mr. Beamer.
"Q. When might that have been?
"A. When in the jail house.
"Q. So you protested your innocence?
"A. In a little room. I believe he asked us how do you let

mony and their adherence to counsel's advice not to take the stand at the preliminary hearing; moreover, the decision not to divulge their defense prior to trial is probably attributable to counsel rather than to petitioners.[10] Nevertheless, unless and until this Court overrules *Raffel* v. *United States*, 271 U. S. 494,[11] I think a state court is

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people get away with people setting up friends like this. He said Bill Bonnell is not your friend and I said no, but I figured he was a good enough acquaintance he would do that.

"Q. Where was that?

"A. Little room there.

"Q. Ever been there before?

"A. Yes, sir.

"Q. When?

. . . . . .

"Q. Did you see me there?

"A. I didn't know who you were at the time. I believe you were in and out of there.

"Q. You didn't say anything to me, did you?

"A. No, I didn't know who you were then." Wood Tr. 470–472.

[10] Under Ohio law, the preliminary hearing determines only whether the defendant should be held for trial. The prosecution need establish, at most, that a crime has been committed and that there is "probable and reasonable cause" to hold the defendant for trial, and the court need only find "substantial credible evidence" of the charge against the defendant. Ohio Rev. Code Ann. §§ 2937.12, 2937.13 (Supp. 1973). Indeed, if a defendant has been indicted, no hearing need be held. *State* v. *Morris*, 42 Ohio St. 2d 307, 326, 329 N. E. 2d 85, 97 (1975). Defense counsel thus will have no incentive to divulge the defendant's case at the preliminary hearing if the prosecution has presented substantial evidence of guilt. Since that was the case here, no significant impeaching inference may be drawn from petitioners' silence at that proceeding.

Petitioners' failure to refer to the "frame" at any time between arrest and trial is somewhat more probative; for if the "frame" story were true, one would have expected counsel to try to persuade the prosecution to dismiss the charges in advance of trial.

[11] *Raffel* was the last decision of this Court to address the constitutionality of admitting evidence of a defendant's prior silence

free to regard the defendant's decision to take the stand as a waiver of his objection to the use of his failure to testify at an earlier proceeding or his failure to offer his version of the events prior to trial.

B

In my judgment portions of the prosecutor's argument to the jury overstepped permissible bounds. In each trial, he commented upon the defendant's silence not only as inconsistent with his testimony that he had been "framed,"

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to impeach his testimony upon direct examination. Raffel had been charged with conspiracy to violate the National Prohibition Act. An agent testified at his first trial that he had admitted ownership of a drinking place; Raffel did not take the stand. The trial ended in a hung jury, and upon retrial, the agent testified as before. Raffel elected to testify and denied making the statement, but he was cross-examined on his failure to testify in the first trial. This Court held that the evidence was admissible because Raffel had completely waived the privilege against self-incrimination by deciding to testify. 271 U. S., at 499.

Subsequent cases, decided in the exercise of this Court's supervisory powers, have diminished the force of *Raffel* in the federal courts. *United States* v. *Hale*, 422 U. S. 171; *Stewart* v. *United States*, 366 U. S. 1; *Grunewald* v. *United States*, 353 U. S. 391. All three of these cases held that the defendant's prior silence or prior claim of the privilege was inadmissible for purposes of impeachment; all three distinguished *Raffel* on the ground that the Court there assumed that the defendant's prior silence was significantly inconsistent with his testimony on direct examination. *Hale*, *supra*, at 175–176; *Stewart*, *supra*, at 5–7; *Grunewald*, *supra*, at 418–424. Two of the three cases relied upon the need to protect the defendant's exercise of the privilege against self-incrimination from unwarranted inferences of guilt, a rationale that is not easily reconciled with the reasoning in *Raffel* that the decision to testify constitutes a complete waiver of the protection afforded by the privilege. Compare *Hale*, *supra*, at 180 and n. 7, and *Grunewald*, *supra*, at 423–424, with *Raffel*, 271 U. S., at 499.

but also as inconsistent with the defendant's innocence.[12] Comment on the lack of credibility of the defendant is plainly proper; it is not proper, however, for the prosecu-

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[12] At Doyle's trial, the prosecutor made the following arguments to the jury:

"Diffuse what the true facts are; obscure the facts and prosecute the prosecution.

"A typical and classic defense, but keep in mind, when you are considering the testimony of the law enforcement officers involved, that not until, Ladies and Gentlemen, not until the trial of this case and prior to this case, the trial of Richard Wood's case, that anybody connected with the prosecution in this case had any idea what stories would be told by Jefferson Doyle and Richard Wood. Not the foggiest idea. Both of them told you on the witness stand that neither one of them said a word to the law enforcement officials on the scene—

. . . . .

"(continuing) on the scene at the point of their arrest, at the Preliminary Hearing before Indictment in this case. Not a word that they were innocent; that this was their position; that somehow, they had been 'set-up.'

"So, when you evaluate the testimony of the Law Enforcement Officials, consider—

. . . . .

"(continuing)—what they had to deal with on the night in question and the months subsequent to that.

. . . . .

"Then they decide that they have been 'had' somehow. They have been framed.

"Now, remember, this fits with the facts as observed by the law enforcement officers except the basic, crucial facts. Somehow, they have been framed. So, if you can believe this, Ladies and Gentlemen, they take off, chase Bill Bonnell around to give his money back to him or ask him what he did to them, yet they don't bother to tell the Law Enforcement Officers.

"It is unbelievable. I think, when you go to the Jury Room, Ladies and Gentlemen, you are going to decide what really happened.

. . . . .

"We have the Fifth Amendment. I agree with it. It is funda-

tor to ask the jury to draw a direct inference of guilt from silence—to argue, in effect, that silence is inconsistent with innocence. But since the two inferences—per-

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mental to our sense and system of fairness, but if you are innocent—

. . . . .

"(continuing)—if you are innocent, Ladies and Gentlemen, if you have been framed, if you have been set-on, etc. etc. etc., as we heard in Court these last days, you don't say, when the law enforcement officer says,—'You are under arrest,'—you don't say,—'I don't know what you are talking about.' You tell the truth. You tell them what happened and you go from there. You don't say,—'I don't know what you are talking about,'— and demand to see your lawyer and refuse to permit a search of your vehicle, forcing the law enforcement agents to get a search warrant.

"If you're innocent, you just don't do it." Doyle Tr. 515–516, 519, 526.

At Wood's trial, he made similar arguments:

"The defense in this case was very careful to make no statements at all until they had the benefit of hearing all the evidence against them and had time to ascertain what they would admit and what they would deny and how they could fit their version of the story with the state's case. During none of this time did we ever hear any business about a set up or frame or anything else. All right.

"Yes, it is the law of our land, and rightfully so, ladies and gentlemen, that nobody must be compelled to incriminate themselves. It is the 5th Amendment. No one can be forced to give testimony against themselves where criminal action charges are pending. It is a very fundamental right and I am glad we have it.

"The idea was nobody can convict himself out of his own mouth and it grew out of the days when they used to whip and beat and extract statements from the defendants and get them to convict themselves out of their own mouth, and I am glad we have that right.

"But ladies and gentlemen, there is one statement I am going to make. If you are innocent, if you are innocent, if you have been framed, if you have been set up as claimed in this case, when do you tell it? When do you tell the policemen that?

. . . . .

"Think about it. After months—after various proceedings and

jury and guilt—are inextricably intertwined because they have a common source, it would be unrealistic to permit comment on the former but to find reversible error in the slightest reference to the latter. In the context of the entire argument and the entire trial, I am not persuaded that the rather sophisticated distinction between permissible comment on credibility and impermissible comment on an inference of guilt justifies a reversal of these state convictions.[13]

Accordingly, although I have some doubt concerning the propriety of the cross-examination about the preliminary hearing and consider a portion of the closing argument improper, I would affirm these convictions.

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for the first time? I am not going to say any more about that but I want you to think about it." Closing Argument of the Prosecutor 12–14, supplementing Wood Tr.

[13] Petitioner Doyle also argues that he was erroneously cross-examined at his trial on his failure to consent to a search of the car he was driving at the time of the arrest. Petitioner Wood appears to raise the similar claim that testimony of other witnesses that he failed to consent to a search of the car was erroneously admitted at his trial. The parties have not argued these issues separately from the questions whether prior silence in various circumstances may be admitted to impeach a defendant or a defense witness. It is apparent, however, that these questions implicate Fourth Amendment issues that merit independent examination. Accordingly, like the Court, I do not address them.

Syllabus

HENDERSON, CORRECTIONAL SUPERINTENDENT *v.* MORGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 74–1529. Argued February 24, 1976—Decided June 17, 1976

Respondent was indicted for first-degree murder, but by agreement with the prosecution and on counsel's advice respondent pleaded guilty to second-degree murder and was sentenced. Subsequently, after exhausting his state remedies in an unsuccessful attempt to have his conviction vacated on the ground that his guilty plea was involuntary, respondent filed a habeas corpus petition in Federal District Court, alleging that his guilty plea was involuntary because, *inter alia,* he was not aware that intent to cause death was an element of second-degree murder. The District Court ultimately heard the testimony of several witnesses, including respondent and his defense counsel in the original prosecution; and the transcript of the relevant state-court proceedings and certain psychological evaluations of respondent, who was substantially below average intelligence, were made part of the record. On the basis of the evidence thus developed the District Court found that respondent had not been advised by counsel or the state court that an intent to cause death was an essential element of second-degree murder, and, based on this finding, held that the guilty plea was involuntary and had to be set aside. The Court of Appeals affirmed. *Held:* Since respondent did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law. The plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless respondent received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady,* 312 U. S. 329, 334. Where the record discloses that defense counsel did not purport to stipulate that respondent had the requisite intent or explain to him that his plea would be admission of that fact, and he made no factual statement or admission necessarily implying that he had such intent, it is im-

possible to conclude that his plea to the unexplained charge of second-degree murder was voluntary. Pp. 644–647.

516 F. 2d 897, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a concurring opinion, in which STEWART, BLACKMUN, and POWELL, JJ., joined, *post*, p. 647. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 652.

Joel Lewittes argued the cause for petitioner. On the brief were *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Ralph L. McMurry*, Assistant Attorney General.

Joseph E. Lynch, by appointment of the Court, 423 U. S. 943, argued the cause and filed a brief for respondent.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense.

The case arises out of a collateral attack on a judgment entered by a state trial court in Fulton County, N. Y., in 1965. Respondent, having been indicted on a charge of first-degree murder, pleaded guilty to second-degree murder and was sentenced to an indeterminate term of imprisonment of 25 years to life. He did not appeal.

In 1970, respondent initiated proceedings in the New York courts seeking to have his conviction vacated on

the ground that his plea of guilty was involuntary.[1] The state courts denied relief on the basis of the written record.[2] Having exhausted his state remedies,[3] in 1973, respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of New York.[4] He alleged that his guilty plea was involuntary because he was not aware (1) of the sentence that might be imposed upon conviction of second-degree murder, or (2) that intent to cause death was an element of the offense. Based on the state-court record, the Federal District Court denied relief. The Court of Appeals reversed summarily and directed the District Court "to conduct an evidentiary hearing on the issues raised by petitioner, including whether, at the time of his entry of his guilty plea, he was aware that intent was an essential element of the crime and was advised of the scope of the punishment that might be imposed."

Upon remand the District Judge heard the testimony of several witnesses including respondent, the two lawyers who had represented him in 1965, the prosecutor,

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[1] On August 7, 1970, he filed both a "Notice of Motion to Withdraw Guilty Plea" and a "Petition for Writ of Error Coram Nobis."

[2] The written record included the transcript of his original arraignment on the first-degree-murder charge on April 15, 1965, transcript of proceedings relating to the impaneling of a jury on June 7, 1965, transcript of the proceedings on June 8, 1965, when he pleaded guilty to second-degree murder, the sentencing hearing on June 15, 1965, an affidavit by the prosecutor, and certain psychological evaluations of respondent.

[3] The order denying his petition for a writ of error *coram nobis* was entered by the Trial Division of the Supreme Court of New York on May 29, 1971. On March 7, 1972, the Appellate Division affirmed without opinion, *People* v. *Morgan*, 38 App. Div. 2d 1012, 330 N. Y. S. 2d 1018; on July 6, 1972, the New York Court of Appeals denied permission to appeal.

[4] Federal jurisdiction was invoked under 28 U. S. C. § 2241 *et seq.*

and respondent's mother. In addition, the transcript of the relevant state-court proceedings and certain psychological evaluations of respondent were made a part of the record.

At the conclusion of the hearing, the District Court made only two specific findings of fact.[5] First, contrary to respondent's testimony, the court expressly found that he was advised that a 25-year sentence would be imposed if he pleaded guilty. Second, the court found that respondent "was not advised by counsel or court, at any time, that an intent to cause the death or a design to effect the death of the victim was an essential element of Murder 2nd degree." On the basis of the latter finding, the District Court held "as a matter of law" that the plea of guilty was involuntary and had to be set aside.[6]

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[5] Memorandum Decision and Order dated Oct. 29, 1974, pp. 4–5, App. 116a–117a.

[6] "In connection with petitioner's second claim however, I find that he was not advised by court or counsel prior to his plea of the elements required to be established for any degree of homicide nor was he aware of the same; particularly, I find that petitioner was not advised by counsel or court, at any time, that an intent to cause the death or a design to effect the death of the victim was an essential element of Murder 2nd degree. As stated by the Supreme Court, 'a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.' *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969). Based upon the foregoing, I hold as a matter of law that petitioner's plea of guilty was not intelligently or knowingly entered and was, therefore, involuntary. Accordingly, petitioner's plea of guilty to Murder 2nd degree must be set aside as involuntary and unconstitutional." The District Court ordered that respondent be discharged from custody "unless the State of New York takes such steps as are necessary to return [him] to Fulton County for rearraignment; said rearraignment is to be held within 60 days of the date hereof . . . ." App. 117a–118a.

This holding was affirmed, without opinion, by the Court of Appeals.[7]

Before addressing the question whether the District Court correctly held the plea invalid as a matter of law, we review some of the facts developed at the evidentiary hearing.

I

On April 6, 1965, respondent killed Mrs. Ada Francisco in her home.

When he was in seventh grade, respondent was committed to the Rome State School for Mental Defectives where he was classified as "retarded." He was released to become a farm laborer and ultimately went to work on Mrs. Francisco's farm. Following an argument, she threatened to return him to state custody. He then decided to abscond. During the night he entered Mrs. Francisco's bedroom with a knife, intending to collect his earned wages before leaving; she awoke, began to scream, and he stabbed her.[8] He took a small amount of money, fled in her car, and became involved in an accident about 80 miles away. The knife was found in the glove compartment of her car. He was promptly arrested and made a statement to the police. He was

[7] 516 F. 2d 897 (CA2 1975).

[8] At the evidentiary hearing in the District Court respondent's attorney testified:

"The Court: I inferred that he struck her, not cut her, didn't use the knife?

"The Witness: Not at first. She didn't stop screaming and then he used the knife many times. *He didn't tell me that,* but the allegation was that he hit her forty-five times with the knife." (Emphasis added.) App. 67a.

Apart from that hearsay, there is no evidence in the record to indicate whether the respondent struck or stabbed Mrs. Francisco many times. The indictment charged that respondent "stabbed and cut Ada Francisco with a dangerous knife, thereby inflicting divers wounds and injuries . . . ." *Id.,* at 85a.

then 19 years old and substantially below average intelligence.[9]

Respondent was indicted for first-degree murder and arraigned on April 15, 1965. Two concededly competent attorneys were appointed to represent him. The indictment, which charged that he "willfully" stabbed his victim, was read in open court. His lawyers requested, and were granted, access to his written statement and to earlier psychiatric reports. A new psychiatric examination was requested and ordered.

Respondent was found competent to stand trial. Defense counsel held a series of conferences with the prosecutors, with the respondent, and with members of his family. The lawyers "thought manslaughter first would satisfy the needs of justice."[10] They therefore endeavored to have the charge reduced to manslaughter, but the prosecution would agree to nothing less than second-degree murder and a minimum sentence of 25 years. The lawyers gave respondent advice about the different sentences which could be imposed for the different offenses, but, as the District Court found, did not explain the required element of intent.

On June 8, 1965, respondent appeared in court with his attorneys and entered a plea of guilty to murder in the second degree in full satisfaction of the first-degree murder charge made in the indictment. In direct colloquy with the trial judge respondent stated that his plea was based on the advice of his attorneys, that he understood he was accused of killing Mrs. Francisco in Fulton County, that he was waiving his right to a jury trial, and that he would be sent to prison. There was no discussion of the elements of the offense of second-de-

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[9] His functioning I. Q. was reported by examiners as in the range between 68 and 72.

[10] *Id.*, at 52a.

gree murder, no indication that the nature of the offense had ever been discussed with respondent, and no reference of any kind to the requirement of intent to cause the death of the victim.

At the sentencing hearing a week later his lawyers made a statement explaining his version of the offense, particularly noting that respondent "meant no harm to that lady" when he entered her room with the knife.[11] The prosecutor disputed defense counsel's version of the matter, but did not discuss it in detail. After studying the probation officer's report, the trial judge pronounced sentence.

At the evidentiary hearing in the Federal District Court, respondent testified that he would not have pleaded guilty if he had known that an intent to cause

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[11] The attorney described the incident, in part, in these words:

"He awakened Mrs. Francisco for the purpose of obtaining the money which was rightfully his, and which he had a right to. Of course it was an unusual hour to do it, but he had returned home late, and he had been threatened with that other thing on the part of Mrs. Francisco of returning him to the Rome School. So I assume, putting all of those factors together, the one idea in his mind was to take his money and get away as far as he could to avoid being transferred back.

"Now, Mrs. Francisco was awakened. Apparently he had stayed there in the house, and she had no fear of him because her bedroom was open. There was no door on it. No locks at all. So when he awakened her, instead of responding to him, she merely started to scream. Now, I assume if she had talked to him that night in a normal tone, this thing would never have happened. But the minute she screamed, of course with his uncontrollable and ungovernable temper, and the idea in mind of perhaps she may awaken the people who were living in the other apartment of the house—there was a man and his wife who were working there for Mrs. Francisco and living in the house—in order to stop the screaming and in the excitement and tension of it all, the assault occurred and as a result Mrs. Francisco met her death." Record on Appeal 32–33.

the death of his victim was an element of the offense of second-degree murder. The District Judge did not indicate whether or not he credited this testimony.[12]

II

Petitioner contends that the District Court applied an unrealistically rigid rule of law. Instead of testing the voluntariness of a plea by determining whether a ritualistic litany of the formal legal elements of an offense was read to the defendant, petitioner argues that the court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused. We do not disagree with the thrust of petitioner's argument, but we are persuaded that even under the test which he espouses, this judgment finding respondent guilty of second-degree murder was defective.

We assume, as petitioner argues, that the prosecutor had overwhelming evidence of guilt available. We also accept petitioner's characterization of the competence of respondent's counsel and of the wisdom of their advice to plead guilty to a charge of second-degree murder. Nevertheless, such a plea cannot support a judgment of

[12] Of course, respondent's testimony on this point was hypothetical. The lawyers were certainly familiar with the intent requirement and evidently were satisfied that the objective evidence available to the prosecutor was sufficiently strong that the requisite intent could be proved beyond a reasonable doubt; accordingly, had this precise issue been discussed with respondent, his lawyers no doubt would have persisted in their advice to plead guilty. It follows that even if respondent's testimony at the hearing was given in complete good faith, there is no way one can be sure that he would have refused to enter the plea following advice expressly including a discussion of this precise question. Indeed, we assume that he probably would have pleaded guilty anyway. Such an assumption is, however, an insufficient predicate for a conviction of second-degree murder.

guilt unless it was voluntary in a constitutional sense.[13] And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady*, 312 U. S. 329, 334.

The charge of second-degree murder was never formally made. Had it been made, it necessarily would have included a charge that respondent's assault was "committed with a design to effect the death of the person killed."[14] That element of the offense might have been proved by the objective evidence even if respondent's actual state of mind was consistent with innocence[15] or manslaughter.[16] But even if such a design to effect death would almost inevitably have been inferred from evidence that respondent repeatedly stabbed Mrs. Francisco, it is nevertheless also true that a jury

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[13] A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, see, *e. g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense. *Smith* v. *O'Grady*, 312 U. S. 329.

[14] In 1965 murder in the second degree was defined as follows by former New York Penal Law § 1046: "Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation."

[15] Although respondent was found competent to stand trial, that finding would not, of course, foreclose a defense of temporary insanity.

[16] The offense of manslaughter in the first degree was defined to include a killing "[i]n the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon." See § 1050.

would not have been required to draw that inference.[17] The jury would have been entitled to accept defense counsel's appraisal of the incident as involving only manslaughter in the first degree. Therefore, an admission by respondent that he killed Mrs. Francisco does not necessarily also admit that he was guilty of second-degree murder.

There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances it is impossible to conclude that his plea to the unexplained charge of second-degree murder was voluntary.

Petitioner argues that affirmance of the Court of Appeals will invite countless collateral attacks on judgments entered on pleas of guilty, since frequently the record will not contain a complete enumeration of the

[17] "The fact that the prisoner plunged this pointed knife into what he knew to be a vital part of the body must raise a presumption that he intended to take life. Its natural result would be to destroy life, and he must be presumed to have intended the natural consequence of his act just as if he had aimed at the heart of the deceased and fired a gun. It was not charged that the evidence was conclusive, but simply that it was presumptive, and it was left to the jury to determine the fact upon the evidence under the charge as given." *Thomas* v. *People*, 67 N. Y. 218, 225 (1876). "The intention may be inferred from the act, but this, in principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court." *Stokes* v. *People*, 53 N. Y. 164, 179 (1873). "[The] jury has the right to find from the results produced an intention to effect it." *People* v. *Cooke*, 292 N. Y. 185, 189, 54 N. E. 2d 357, 359 (1944). "[T]he jury was not bound to presume an intent to kill from the intentional stabbing." *Id.*, at 190, 54 N. E. 2d, at 360.

elements of the offense to which an accused person pleads guilty.[18] We think petitioner's fears are exaggerated.

Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent. Moreover, respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight; it also forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder.

Since respondent did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, concurring.

There are essentially two ways under our system of criminal justice in which the factual guilt of a defendant may be established such that he may be deprived of his

[18] There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second-degree murder that notice of that element is required.

liberty consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The first is by a verdict of a jury which, or a decision of a judge who, concludes after trial that the elements of the crime have been proved beyond a reasonable doubt. The second is by the defendant's own solemn admission "in open court that he is *in fact guilty* of the offense with which he is charged," *Tollett* v. *Henderson*, 411 U. S. 258, 267 (1973) (emphasis added), *i. e.*, by a plea of guilty. The Court has repeatedly emphasized that "a guilty plea for federal purposes is a judicial *admission of guilt* conclusively establishing a defendant's factual guilt." *Lefkowitz* v. *Newsome*, 420 U. S. 283, 299 (1975) (WHITE, J., dissenting) (emphasis added). We said in *Brady* v. *United States*, 397 U. S. 742, 748 (1970), that "central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." In *McMann* v. *Richardson*, 397 U. S. 759, 773 (1970), we said that the defendant who pleads guilty is "convicted on his counseled admission in open court that he committed the crime charged against him"; and that "[a] conviction after a plea of guilty *normally* rests on the defendant's own admission in open court that he committed the acts with which he is charged." *Id.*, at 766.[1] (Emphasis added.)

[1] There exists what may be viewed as a third method of establishing a defendant's factual guilt. We have permitted judgment to be entered against a defendant on his intelligent plea of guilty accompanied by a claim of innocence. We said in *North Carolina* v. *Alford*, 400 U. S. 25, 37 (1970):

"[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly

The problem in this case is that the defendant's guilt has been established neither by a finding of guilt beyond a reasonable doubt after trial nor by the defendant's own admission that he is in fact guilty. The defendant did not expressly admit that he intended the victim's death (such intent being an element of the crime for which he stands convicted); and his plea of guilty cannot be construed as an implied admission that he intended her death because the District Court has found that he was not told and did not know that intent to kill was an element of the offense with which he was charged.[2]

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consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

We held that where "a defendant *intelligently* concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt" a plea may be accepted even if accompanied by protestations of innocence. *Ibid.* (Emphasis added.) However, in that case the defendant pleaded guilty to second-degree murder after acknowledging that his "counsel had informed him of the difference between second- and first-degree murder." *Id.*, at 28–29. *Alford* is based on the fact that the defendant could intelligently have concluded that, whether he believed himself to be innocent and whether he could bring himself to admit guilt or not, the State's case against him was so strong that he would have been convicted anyway. Since such a defendant has every incentive to conclude otherwise, such a decision made after consultation with counsel is viewed as a sufficiently reliable substitute for a jury verdict that a judgment may be entered against the defendant. Plainly, a defendant cannot "intelligently" reach that conclusion if he does not know the elements of the crime to which he is pleading and therefore does not know what the State has to prove; and his ignorant decision to plead guilty under such circumstances is not a reliable indication that he is in fact guilty.

[2] This case is unusual in that the offense to which the defendant pleaded was not charged in the indictment. The indictment charged first-degree murder. The defendant pleaded guilty to the included offense of second-degree murder, the elements of which were not set forth in any document which had been read to the

Accordingly, the best that can be said for the judgment of conviction entered against the defendant is that it rests on strong evidence—never presented to a trier of fact—or that it rests on the judgment of his lawyer that he would probably be convicted of second-degree murder if he went to trial. It should hardly need saying that a judgment of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury is waived) and unless the jury (or judge) finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be "harmless error" wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged. Similarly, it is too late in the day to permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent—his lawyer. Our cases make absolutely clear that the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea and what it is that he waives when he pleads, *Boykin* v. *Alabama*, 395 U. S. 238 (1969); and it is on his admission that he is in fact guilty that his conviction will rest.

In this case the defendant's factual guilt of second-degree murder has never been established in any fashion permitted by the Due Process Clause of the Fourteenth Amendment.

The dissent concedes that the conviction in this case was entered in violation of the United States Constitu-

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defendant or to which he had access. See *McCarthy* v. *United States*, 394 U. S. 459, 467 n. 20 (1969). In those cases in which the indictment is read to the defendant by the court at arraignment or at the time of his plea, his plea of guilty may well be deemed a factual admission that he did what he is charged with doing so that a judgment of conviction may validly be entered against him.

tion. The dissent argues, however, that to set this defendant's conviction aside is to apply a new constitutional rule retroactively. The argument was not made by the petitioner in this case and is, in any event, untenable. In order to escape application of a constitutional rule to a particular criminal case, on nonretroactivity grounds, the State must point to a judicial decision occurring after the operative facts of the case in question clearly establishing the rule. The constitutional rule relevant to this case is that the defendant's guilt is not deemed established by entry of a guilty plea, unless he either admits that he committed the crime charged, or enters his plea knowing what the elements of the crime charged are. If this is a new rule, created since the defendant entered his plea, I am at a loss to know what case, other than this one, established it. *McCarthy* v. *United States,* 394 U. S. 459 (1969), did not do so. That case involved only a construction of Fed. Rule Crim. Proc. 11, and has no application to the States. *Boykin* v. *Alabama, supra,* did not do so. It does not mention the method of establishing the defendant's factual guilt. The only case which arguably addresses the issue in this case is *Brady* v. *United States,* 397 U. S. 742, 749 n. 6, which observed in dictum: "[T]he importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him . . . was at the heart of our recent decisions in *McCarthy* v. *United States, supra,* and *Boykin* v. *Alabama,* 395 U. S. 238 (1969)." However, new rules of constitutional law are not established in dicta in footnotes. Either a new constitutional rule is being established in *this* case—in which event we will have to address at some future time the question whether this rule is retroactive—or, as I believe to be true, this case rests on the long-accepted principle that a guilty plea must provide a

trustworthy basis for believing that the defendant is in fact guilty. If so, then the principle will and should govern all similar cases presented to us in the future. In any event, the judgment of the court below should be affirmed, and I join the opinion of the Court.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion affirms a judgment which directs the release on federal habeas of a state prisoner who, on advice of counsel, pleaded guilty in the New York State courts 11 years ago to a charge of second-degree murder. The Court declares its agreement with petitioner's contention that the test for reviewing the constitutional validity of a counseled plea of guilty should be "the totality of the circumstances," *ante*, at 644. But the Court's holding can be justified only if the Constitution requires that "a ritualistic litany of the formal legal elements of an offense [be] read to the defendant," *ibid.*, a requirement which it purports to eschew.[1] The Court accomplishes this result by imposing on state courts, as a constitutional requirement, a definition of "voluntariness" announced by this Court in *McCarthy* v. *United States*, 394 U. S. 459 (1969), in which the Court interpreted a provision of the Federal Rules of Criminal Procedure. Yet that case has been held to have only prospective application even as to the federal courts. *Halliday* v. *United States*, 394 U. S. 831 (1969).

McCarthy extended the definition of voluntariness to include an "understanding of the essential elements of the crime charged, including the requirement of specific

[1] Admittedly the Court does not require that this litany be performed on the record, but the requirement that it be performed at some point in the proceedings, whether by counsel or by the court, is clear.

intent . . . ," 394 U. S., at 471. But prior to *McCarthy*, and to this Court's decision of a related issue in *Boykin* v. *Alabama*, 395 U. S. 238 (1969), the generally accepted standard for a valid guilty plea in federal courts was set forth in *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962), which in turn relied on *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927). Though these were federal cases, certainly no more stringent a standard could be applied as a matter of constitutional law on federal habeas review of state convictions. The Court said in *Machibroda*:

> " 'Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.' " 368 U. S., at 493, quoting *Kercheval*, *supra*, at 223.

These cases thus set forth a three-pronged test: The plea of guilty must be made voluntarily, it must be made after proper advice, and it must be made with full understanding of the consequences. There can be no doubt that respondent entered his plea "with full understanding of the consequences" because the District Court expressly so found. Nor can there be any serious doubt that respondent's plea was made "voluntarily" as that term is used in *Machibroda* and the previous cases upon which it relies.

There was no contention in the federal habeas court that respondent's guilty plea was not "voluntary" in the normal sense of that word. There was no hint of physical or psychological coercion, and respondent was represented by not one but two admittedly capable defense attorneys. While *McCarthy* v. *United States*, *supra*, at 471, expands the notion of "voluntariness" to include the concept that a defendant must have an "understanding

of the essential elements of the crime charged, including the requirement of specific intent . . . ," in order for a plea in the federal courts to be valid under Fed. Rule Crim. Proc. 11, that decision was held prospective only in *Halliday, supra.* Even had it not been, Rule 11 by its terms applies only to proceedings in federal courts.

A perusal of cases in the Courts of Appeals decided before *McCarthy, supra,* and *Boykin, supra,* indicates that, at least in the case where the defendant is counseled, there was no requirement that every element of the offense be explained to or admitted by the defendant [2] or even in every case that the consequences of the plea be enunciated. *E. g., United States* v. *Cariola,* 323 F. 2d 180 (CA3 1963); *McGrady* v. *Cunningham,* 296 F. 2d 600 (CA4 1961), cert. denied, 369 U. S. 855 (1962); *Kennedy* v. *United States,* 259 F. 2d 883 (CA5 1958), cert. denied, 359 U. S. 994 (1959); *United States* v. *Swaggerty,* 218 F. 2d 875 (CA7), cert. denied, 349 U. S. 959 (1955); see discussion in *Halliday, supra,* at 833. Thus, unless the Court intends to establish a new and far more stringent standard for all guilty pleas entered before the 1969 decisions of this Court in *Boykin* and *McCarthy,* respondent's plea was "voluntary" as that term was understood before the decisions in those cases.[3]

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[2] The Court disclaims such a holding. *Ante,* at 647 n. 18. However, by holding that intent was a "critical element" here which must be described to the defendant the Court has accomplished the same effect, for every crime requires an intent and it is no more "critical" an element in this case than in any other. Indeed, it would seem to be far less significant here because it could have been presumed by the jury without any specific proof.

[3] In *Brady* v. *United States,* 397 U. S. 742, 755 (1970), the Court, in dealing with a pre-*McCarthy* guilty plea held that the "standard as to the voluntariness of guilty pleas" is that " ' "[A] plea of guilty entered by one fully aware of the direct consequences, including the

But the Court refers to "voluntary in a constitutional sense" stating that the term includes the requirement of "'real notice of the true nature of the . . .' charge," *ante,* at 645, citing the pre-*Boykin* case of *Smith* v. *O'Grady,* 312 U. S. 329 (1941). *Smith* involved an "uneducated" defendant "without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty." *Id.,* at 334. The Court further observed that Smith's plea was involuntary because he had not received any "real notice of the true nature of the charge against him." *Ibid.* That is, he was told he was pleading to "simple burglary" and would receive a 3-year sentence when in fact he was tricked into pleading to "burglary with explosives" and was sentenced to 20 years. Thus the "notice" required by *Smith* is accurate information as to the offense and sentence to which one is pleading, which respondent received.

Since it seems clear under the foregoing analysis that respondent's plea was "voluntarily made," and since it is undisputed that it was made with full understanding of its consequences, the only remaining issue is whether he was "properly advised," as that term is used in *Machibroda, supra.* This inquiry, in turn, depends upon the sort of advice reasonably competent counsel would have been expected to give him, see *Brady* v. *United States,* 397 U. S. 742, 756–757 (1970), and *McMann* v. *Richardson,* 397 U. S. 759, 770 (1970). Thus the test

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actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g., bribes).'" (Citation omitted.)

to be applied is not whether respondent's attorneys mechanically recited to him the elements of the crime with which he was charged as those elements would have been set forth in black letter law in a criminal law hornbook, but rather it is a test based on the practices of reasonably competent attorneys experienced in the day-to-day business of representing criminal defendants in a trial court.

The Court states that it "accept[s] petitioner's characterization of the competence of respondent's counsel and of the wisdom of their advice to plead guilty to a charge of second-degree murder." *Ante*, at 644.

In *McMann, supra*, the Court held that the requirement that a guilty plea be intelligently made "is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." 397 U. S., at 770. In this case, counsel advised their client as to the penalty for second-degree murder but did not go into "detail" as to the differences between first- and second-degree murder, believing that their client would not be interested. App. 57a. Now, 11 years later, this Court concludes that counsel's decision was an error of constitutional magnitude.

Respondent was originally indicted for the crime of first-degree murder, and that indictment charged that in April 1965, he had "willfully, feloniously and of malice aforethought, stabbed and cut Ada Francisco with a dangerous knife . . . and that thereafter . . . the said Ada Francisco died of said wounds and injuries, said killing being inexcusable and unjustifiable." *Id.*, at 85a. Respondent's attorney at the habeas hearing testified that respondent had stabbed his victim "many times" (*id.*, at 67a), which suggests that experienced counsel would not consider the "design to effect death" issue to be in serious dispute. The habeas judge, in deciding that there was a

factual basis for the entry of the plea, took much the same approach when he observed:

> "The Court: Well the intent, I think there is a factual basis from the evidence where it, that is the jury would have a right to infer on the mere fact, I think when he hit her first and then used the knife, that there were multiple knife wounds, that the jury could infer, and as a matter of fact, I think from those same facts the Judge would have to permit the jury to decide as a question of fact whether there was premeditation on first degree murder, so that this man was a long way short of being out of the woods.
>
> "So I am satisfied that there was a factual basis for the entry of the plea." *Id.*, at 78a.

I do not see how this Court, or any court, could conclude on this state of the record that respondent was not "properly advised" at the time he entered his plea of guilty to the charge of second-degree murder.

His attorneys were motivated by the eminently reasonable tactical judgment on their part that he should plead guilty to second-degree murder in order to avoid the possibility of conviction for first-degree murder with its more serious attendant penalties. Since the Court concedes both the competence of respondent's counsel and the wisdom of their advice, that should be the end of the matter.

There are intimations in the Court's opinion that the vice which it finds in the guilty plea is not that respondent was not *informed* of all the elements of the offense, but that instead he did not *admit* to all of those elements. *Ante*, at 646. But it is quite clear under our decision in *North Carolina* v. *Alford*, 400 U. S. 25 (1970), that the latter fact, standing alone, is not sufficient to invalidate a guilty plea. In *Alford* the defend-

ant not only was not asked to admit to a certain element of the offense, as here, but affirmatively *denied* having committed the crime at all. Yet we upheld the guilty plea because, as here, it was a tactically sound decision for the defendant to plead to second-degree murder in order to escape the greater penalties which might result from a first-degree murder conviction. In *Alford* we placed great weight on the fact that, as in this case, "the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." *Id.*, at 31.

Thus the fact, relied upon by the Court, *ante*, at 645–646, that a jury would not have been *required* to infer the requisite intent from the facts admitted at the guilty plea is not significant. Alford, at his guilty plea, presented a complete defense to the crime by stating that he had not shot anyone. 400 U. S., at 28 n. 2. Respondent admitted the stabbing but made no statement as to his intent. Even if he had *denied* the intent, this plea would be valid under *Alford*.

The "totality of the circumstances" in this case shows that respondent pleaded guilty to second-degree murder upon the advice of competent counsel. His plea was in no way the result of physical or psychological coercion or overreaching by the State, and he was fully advised as to the consequences of that plea. True, he was not expressly advised that the "design to effect death" was an element of the offense to which he was pleading, although the original first-degree-murder indictment charging "malice aforethought" had been read to him. Given the finding of the habeas judge that there was more than ample evidence from which the jury could have found that respondent had the requisite intent, I cannot subscribe to the Court's invalidation of his pre-1969 guilty plea for such an extremely technical defect.

In adopting the rule it does, the Court opens the door to countless similarly situated prisoners to withdraw their guilty pleas many years after they were entered. Since it is unlikely that prosecutors will be able to reassemble witnesses and evidence at this late date to try these prisoners, the practical effect of the Court's ruling will be to release these prisoners who at one time freely admitted their guilt.

PENNSYLVANIA *v.* NEW JERSEY

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 68, Orig. Argued December 3, 1975—Decided June 17, 1976*

Under the New Jersey Transportation Benefits Tax Act, New Jersey does not tax its residents' domestic income, but does tax nonresidents' New Jersey-derived income and imposes an equivalent tax on residents' income earned outside the State except that such income is exempted to the extent it is taxed by the State in which it is earned. The New Hampshire Commuters Tax was held unconstitutional in *Austin* v. *New Hampshire*, 420 U. S. 656, in violation of the Privilege and Immunities Clause because it fell exclusively on nonresidents' income and was not offset by other taxes imposed on residents alone. Pennsylvania, suing on behalf of itself and as *parens patriae* on behalf of its citizens, moved to file an original bill of complaint against New Jersey, contending that the New Jersey tax Act violates the Privileges and Immunities Clause as interpreted in *Austin*, *supra*, and also the Equal Protection Clause of the Fourteenth Amendment, and seeking declaratory and injunctive relief and an accounting for taxes diverted from its treasury by the New Jersey tax. Maine, Massachusetts, and Vermont on behalf of themselves moved, in reliance on *Austin*, *supra*, to file an original bill of complaint against New Hampshire seeking an accounting for the taxes diverted from their respective treasuries by the New Hampshire Commuters Income Tax. Pennsylvania, Maine, Massachusetts, and Vermont all extend a tax credit to their residents for income taxes paid to other States. *Held:*

1. The motions for leave to file bills of complaint based on claims brought by the plaintiff States on their own behalf are denied. In neither suit has the defendant State directly injured the plaintiff States by imposing the taxes in question, but the injuries to the plaintiffs' fisces were self-inflicted, resulting from decisions by their respective state legislatures to allow their residents credit for taxes paid to other States. Moreover, the Privileges and Immunities and Equal Protection Clauses protect people, not States.

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*Together with No. 69, Orig., *Maine et al.* v. *New Hampshire*, also on motion for leave to file bill of complaint.

2. Pennsylvania's motion for leave to file suit as *parens patriae* on behalf of its citizens is also denied, since such a suit represents nothing more than a collectivity of private suits against New Jersey for taxes withheld from private parties, and no sovereign or quasi-sovereign interests of Pennsylvania are implicated.

Lawrence Silver, Deputy Attorney General of Pennsylvania, argued the cause for plaintiff in No. 68, Original. With him on the brief were *Robert P. Kane,* Attorney General, and *Donald J. Murphy* and *Howard M. Levinson,* Deputy Attorneys General. *Joseph E. Brennan,* Attorney General of Maine, and *Benson D. Scotch,* Assistant Attorney General of Vermont, argued the cause for plaintiffs in No. 69, Original. With them on the brief were *Martin L. Wilk,* Deputy Attorney General of Maine, and *Donald G. Alexander,* Assistant Attorney General, *Francis X. Bellotti,* Attorney General of Massachusetts, and *James R. Adams,* Assistant Attorney General, and *M. Jerome Diamond,* Attorney General of Vermont.

Stephen Skillman, Assistant Attorney General of New Jersey, argued the cause for defendant in No. 68, Original. With him on the brief were *William F. Hyland,* Attorney General, and *Herbert Glickman,* Deputy Attorney General. *Charles G. Cleaveland,* Assistant Attorney General of New Hampshire, argued the cause for defendant in No. 69, Original. With him on the brief were *Warren B. Rudman,* Attorney General, and *Donald W. Stever, Jr.,* Assistant Attorney General.

PER CURIAM.

The motions for leave to file bills of complaint in these cases are denied.

The complaints, which seek to invoke our original jurisdiction, filed by Pennsylvania against New Jersey, and by Maine, Massachusetts, and Vermont against New Hampshire, rely on our decision last Term in *Austin*

v. *New Hampshire*, 420 U. S. 656 (1975), in which we held the New Hampshire Commuters Income Tax unconstitutional.

In *Austin, supra*, the Court held that the New Hampshire tax violated the Privileges and Immunities Clause of the Constitution. That law imposed a 4% tax on the New Hampshire-derived income of nonresidents. Although the law also imposed a tax on the income earned by New Hampshire residents outside the State, it then exempted such income from the tax if the income were either taxed or not taxed by the State from which it was derived. Since New Hampshire also did not tax the domestic income of its residents, the net effect of the Commuters Income Tax was to tax only the incomes of nonresidents working in New Hampshire.

The resident State of the plaintiff in *Austin* was Maine, and it provided a credit for income taxes paid to other States. Thus, New Hampshire's beggar-thy-neighbor tax rendered the total state tax liability of nonresidents unchanged, but diverted to New Hampshire tax revenues from the treasury of Maine. We held New Hampshire's taxing scheme unconstitutional since the tax "[fell] exclusively on the income of nonresidents . . . and [was] not offset even approximately by other taxes imposed upon residents alone." *Id.*, at 665 (footnote deleted).

In No. 68, Original, Pennsylvania contends that the New Jersey Transportation Benefits Tax Act, N. J. Stat. Ann. § 54:8A–58 *et seq.* (Supp. 1976–1977), is infirm under the Privileges and Immunities Clause as interpreted in *Austin, supra*, and the Equal Protection Clause of the Fourteenth Amendment. According to the complaint filed by Pennsylvania, the New Jersey tax fatally resembles the tax we held unconstitutional in *Austin*. Like New Hampshire, New Jersey does not tax the domestic income of its residents. Under the Transporta-

tion Benefits Tax Act, however, New Jersey does tax the New Jersey-derived income of nonresidents. And while that Act imposes an equivalent tax on the income of New Jersey residents earned outside the State, it exempts such income to the extent it is taxed by the State in which it is earned. Finally, like Maine in the *Austin* case, Pennsylvania permits a tax credit to any of its residents for income taxes paid to other States, including, of course, New Jersey. Pennsylvania, suing on behalf of itself and as *parens patriae* on behalf of its citizens, seeks declaratory and injunctive relief and, apparently, an accounting for the taxes that New Jersey's allegedly unconstitutional tax has diverted from the Pennsylvania treasury.

The plaintiffs in No. 69, Original, Maine, Massachusetts, and Vermont, explicitly premise their suit on the decision in *Austin, supra.* They seek on behalf of themselves an accounting for the taxes, alleged to amount to over $13.5 million, that New Hampshire's unconstitutional Commuters Income Tax diverted from their respective treasuries.

It has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State. As Mr. Chief Justice Hughes noted on behalf of the Court in *Massachusetts* v. *Missouri,* 308 U. S. 1, 15 (1939): "To constitute such a [justiciable] controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress . . . ."

In *Massachusetts* v. *Missouri, supra,* Massachusetts sought a declaration that only it could impose an inheritance tax on the estate of a Massachusetts domiciliary who had died with most of his assets located in

several revocable Missouri trusts. The assets located in Massachusetts were insufficient to pay that State's inheritance taxes. Missouri also claimed the exclusive right to impose its tax on the Missouri trusts. In language that is particularly appropriate for our disposition of these cases, the Court denied leave to file the complaint:

> "Missouri, in claiming a right to recover taxes from the . . . trustees, or in taking proceedings for collection, is not injuring Massachusetts. By the allegations, the property held in Missouri is amply sufficient to answer the claims of both States and recovery by either does not impair the exercise of any right the other may have. It is not shown that there is danger of the depletion of a fund or estate at the expense of the complainant's interest. It is not shown that the tax claims of the two States are mutually exclusive. On the contrary, the validity of each claim is wholly independent of that of the other . . . ." *Ibid.*

In neither of the suits at bar has the defendant State inflicted any injury upon the plaintiff States through the imposition of the taxes held, in No. 69, and alleged, in No. 68, to be unconstitutional. The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No State can be heard to complain about damage inflicted by its own hand.

Pennsylvania, in attempting to establish its entitlement to taxes collected by New Jersey from its residents, has alleged that the New Jersey Transportation Benefits

Tax Act violates both the Privileges and Immunities Clause and the Equal Protection Clause. Maine, Massachusetts, and Vermont claim that New Hampshire's withholding of taxes collected under its unconstitutional commuters tax violates the Privileges and Immunities Clause. The short answer to these contentions is that both Clauses protect people, not States.

What has been said disposes of the claims brought by the plaintiff States on their own behalf. In addition, however, Pennsylvania has filed a claim against New Jersey as *parens patriae* on behalf of its citizens.

The Court has recognized the legitimacy of *parens patriae* suits. See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 257–260 (1972); *Louisiana* v. *Texas*, 176 U. S. 1, 19 (1900). It has, however, become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens. Compare, *e. g.*, *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387 (1938); *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277 (1911); *Kansas* v. *United States*, 204 U. S. 331 (1907) (States may not invoke original jurisdiction of Supreme Court to prosecute purely personal claims of their citizens), with, *e. g.*, *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923); *New York* v. *New Jersey*, 256 U. S. 296 (1921); *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907); *Kansas* v. *Colorado*, 206 U. S. 46 (1907) (original jurisdiction sustained for States protecting quasi-sovereign interests).

This rule is a salutary one. For if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, § 2, of

the Constitution, between suits brought by "Citizens" and those brought by "States" would evaporate.

Pennsylvania's *parens patriae* suit against New Jersey represents nothing more than a collectivity of private suits against New Jersey for taxes withheld from private parties. No sovereign or quasi-sovereign interests of Pennsylvania are implicated. Accordingly, Pennsylvania's motion for leave to file suit as *parens patriae* on behalf of its citizens is also denied.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE dissent and would grant leave to file both bills of complaint.

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, concurring.

Obviously, and naturally, I join the Court's *per curiam* opinion. Last Term, in lonely dissent, in the case which has spawned the present motions by Pennsylvania and by Maine, Massachusetts, and Vermont, I said:

> "Because the New Hampshire income tax statutes operate in such a way that no New Hampshire resident is ultimately subjected to the State's income tax, the case at first glance appears to have some attraction. That attraction, however, is superficial and, upon careful analysis, promptly fades and disappears entirely. The reason these appellants, who are residents of Maine, not of New Hampshire, pay a New Hampshire tax is because the Maine Legislature—the appellants' own duly elected representatives—has given New Hampshire the option to divert this increment of tax (on a Maine resident's income earned in New Hampshire) from Maine to New Hampshire, and New Hampshire willingly has picked up that option. All that New Hampshire

has done is what Maine specifically permits and, indeed, invites it to do. If Maine should become disenchanted with its bestowed bounty, its legislature may change the Maine statute. The crux is the statute of Maine, not the statute of New Hampshire. The appellants, therefore, are really complaining about their own statute. It is ironic that the State of Maine, which allows the credit, has made an appearance in this case as an *amicus* urging, in effect, the denial of the credit by an adjudication of unconstitutionality of New Hampshire's statute. It seems to me that Maine should be here seeking to uphold its own legislatively devised plan or turn its attention to its own legislature." *Austin* v. *New Hampshire,* 420 U. S. 656, 668–669 (1975).

The Court in its *per curiam, ante,* at 664, now concedes that the "injuries to the plaintiffs' fiscs were self-inflicted" and that no State "can be heard to complain about damages inflicted by its own hand." *Quod approbo non reprobo.*

CITY OF EASTLAKE ET AL. *v.* FOREST CITY ENTERPRISES, INC.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 74–1563. Argued March 1, 1976—Decided June 21, 1976

The Ohio Constitution reserves to the people of each municipality in the State the power of referendum with respect to all questions that the municipality is authorized to control by legislation. Respondent real estate developer applied for a zoning change to permit construction of a high-rise apartment building on land it owned in petitioner Ohio city. While the application was pending, the city charter was amended by popular vote so as to require that any changes in land use agreed to by the City Council be approved by a 55% vote in a referendum. The City Planning Commission recommended, and the City Council approved, the proposed zoning change, but the Commission rejected respondent's further application for "parking and yard" approval for the proposed apartment building on the ground that the Council's rezoning action had not been submitted to a referendum. Respondent then filed suit in state court, seeking a judgment declaring the city charter amendment invalid as an unconstitutional delegation of legislative power to the people. While the action was pending, the proposed zoning change was defeated in a referendum. The charter amendment was upheld by the trial court and by the Ohio Court of Appeals, but the Ohio Supreme Court reversed, holding that the amendment constituted a delegation of power violative of federal constitutional due process guarantees because the voters were given no standards to guide their decision. *Held:* The city charter amendment does not violate the due process rights of a landowner who applies for a zoning change. Pp. 672–679.

(a) A referendum, which is a means for direct political participation by the people, allowing them what amounts to a veto power over legislative enactments, cannot be characterized as a delegation of power. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters that might otherwise be assigned to the legislature, and here the power of referendum was specifically reserved to the people under the Ohio Constitution. Pp. 672–674.

(b) The doctrine that legislative delegation of power to regulatory bodies must be accompanied by discernible standards is inapplicable where, as here, rather than power being delegated, the power exercised is one reserved by the people to themselves. P. 675.

(c) A referendum result that is arbitrary and capricious, bearing no relation to police power, is open to challenge in state court, where the scope of the available state remedy would be determined as a matter of state law and under the Fourteenth Amendment. Pp. 676–677.

(d) As a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance. *Eubank* v. *Richmond*, 226 U. S. 137; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, distinguished. Pp. 677–679.

41 Ohio St. 2d 187, 324 N. E. 2d 740, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, *post*, p. 680. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 680.

J. Melvin Andrews argued the cause and filed briefs for petitioners.

William D. Ginn argued the cause for respondent. With him on the brief were *Michael M. Hughes* and *Stephen L. Buescher.**

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*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Carl Boronkay*, Assistant Attorney General, and *Roderick Walston* and *Richard C. Jacobs*, Deputy Attorneys General, for the State of California; by *Barry M. Byron* for the city of Euclid, Ohio, et al.; and by *Robert R. Soltis* for the city of Garfield Heights, Ohio, et al.

Briefs of *amici curiae* urging affirmance were filed by *William J. Brown*, Attorney General, and *Earl M. Manz* and *David G. Latanick*, Assistant Attorneys General, for the State of Ohio; by *Richard F. Babcock*, *David L. Callies*, and *R. Marlin Smith* for the National

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question in this case is whether a city charter provision requiring proposed land use changes to be ratified by 55% of the votes cast violates the due process rights of a landowner who applies for a zoning change.

The city of Eastlake, Ohio, a suburb of Cleveland, has a comprehensive zoning plan codified in a municipal ordinance. Respondent, a real estate developer, acquired an eight-acre parcel of real estate in Eastlake zoned for "light industrial" uses at the time of purchase.

In May 1971, respondent applied to the City Planning Commission for a zoning change to permit construction of a multifamily, high-rise apartment building. The Planning Commission recommended the proposed change to the City Council, which under Eastlake's procedures could either accept or reject the Planning Commission's recommendation. Meanwhile, by popular vote, the voters of Eastlake amended the city charter to require that any changes in land use agreed to by the Council be approved by a 55% vote in a referendum.[1] The City

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Association of Home Builders et al.; and by *Paul A. Peterson, James B. Mehalick,* and *Stephen J. Pollak* for the San Diego Building Contractors Assn. et al.

[1] As adopted by the voters, Art. VIII, § 3, of the Eastlake City Charter provides in pertinent part:

"That any change to the existing land uses or any change whatsoever to any ordinance . . . cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council should approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than

Council approved the Planning Commission's recommendation for reclassification of respondent's property to permit the proposed project. Respondent then applied to the Planning Commission for "parking and yard" approval for the proposed building. The Commission rejected the application, on the ground that the City Council's rezoning action had not yet been submitted to the voters for ratification.

Respondent then filed an action in state court, seeking a judgment declaring the charter provision invalid as an unconstitutional delegation of legislative power to the people.[2] While the case was pending, the City Council's action was submitted to a referendum, but the proposed zoning change was not approved by the requisite 55% margin. Following the election, the Court of Common Pleas and the Ohio Court of Appeals sustained the charter provision.[3]

The Ohio Supreme Court reversed. 41 Ohio St. 2d 187, 324 N. E. 2d 740 (1975). Concluding that enactment of zoning and rezoning provisions is a legislative function, the court held that a popular referendum

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one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. . . ."

[2] Respondent also contended that the charter amendment could not apply to its rezoning application since the application was pending at the time the amendment was adopted. The Court of Common Pleas rejected the argument. Respondent neither appealed this point nor argued it in the Court of Appeals or the Ohio Supreme Court; the issue is therefore not before us.

[3] The Court of Common Pleas, however, invalidated the charter provision requiring assessment of election costs against the affected property owner. In affirming, the Court of Appeals also upheld that portion of the trial court's judgment. No appeal was taken to the Ohio Supreme Court on this issue. The question was, accordingly, not passed on by the State Supreme Court, and is therefore not before us.

requirement, lacking standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, hence arbitrary and capricious manner. Relying on this Court's decisions in *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116 (1928), *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526 (1917), and *Eubank* v. *Richmond*, 226 U. S. 137 (1912), but distinguishing *James* v. *Valtierra*, 402 U. S. 137 (1971), the court concluded that the referendum provision constituted an unlawful delegation of legislative power.[4]

We reverse.

I

The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, *e. g.*, The Federalist No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. *Hunter* v. *Erickson*, 393 U. S. 385, 392 (1969).[5]

The reservation of such power is the basis for the

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[4] Respondent did not challenge the 55%-affirmative requirement as such. Instead, respondent contended that any mandatory referendum provision, regardless of the requisite margin for approval, violated due process as applied to its rezoning application.

[5] The people of Ohio, in establishing the general assembly, provided:

"The legislative power of the state shall be vested in a General Assembly . . . but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote . . . ." Ohio Const., Art. II, § 1.

town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes.[6] The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to "give citizens a voice on questions of public policy." *James* v. *Valtierra, supra,* at 141.

In framing a state constitution, the people of Ohio specifically reserved the power of referendum to the people of each municipality within the State.

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . . ." Ohio Const., Art. II, § 1f.

To be subject to Ohio's referendum procedure, the question must be one within the scope of legislative power. The Ohio Supreme Court expressly found that the City Council's action in rezoning respondent's eight acres from light industrial to high-density residential use was legislative in nature.[7] Distinguishing between administrative and legislative acts, the court separated the power to zone or rezone, by passage or amendment of a

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[6] In Massachusetts, for example, the inhabitants could convene a town meeting for the purpose of regulating nuisances. A. De Wolf, The Town Meeting: A Manual of Massachusetts Law 136 (1890). See generally Bryan, Town Meeting Government Still Supported in Vermont, 61 Nat. Civic R. 348 (1972).

[7] The land use change requested by respondent would likely entail the provision of additional city services, such as schools and police and fire protection. Cf. *James* v. *Valtierra,* 402 U. S. 137, 143 n. 4 (1971). The change would also diminish the land area available for industrial purposes, thereby affecting Eastlake's potential economic development.

zoning ordinance, from the power to grant relief from unnecessary hardship.[8] The former function was found to be legislative in nature.[9] Accord, *Denney* v. *Duluth*, 295 Minn. 22, 28–29, 202 N. W. 2d 892, 895–896 (1972); *Smith* v. *Township of Livingston*, 106 N. J. Super. 444, 454, 256 A. 2d 85, 90 (1969); *Wollen* v. *Borough of Fort Lee*, 27 N. J. 408, 422, 142 A. 2d 881, 888–889 (1958); *Johnston* v. *City of Claremont*, 49 Cal. 2d 826, 835–836, 323 P. 2d 71, 76–77 (1958); *Dwyer* v. *City Council*, 200 Cal. 505, 515, 253 P. 932, 935–936 (1927); *Hilltop Realty, Inc.* v. *City of South Euclid*, 110 Ohio App. 535, 164 N. E. 2d 180 (1960). Compare *Kelley* v. *John*, 162 Neb. 319, 75 N. W. 2d 713 (1956), with *In re Frank*, 183 Neb. 722, 723, 164 N. W. 2d 215, 216 (1969).

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[8] By its nature, zoning "interferes" significantly with owners' uses of property. It is hornbook law that "[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning." 8 E. McQuillan, Municipal Corporations § 25.44, p. 111 (3d ed., 1965). There is, of course, no contention in this case that the existing zoning classification renders respondent's property valueless or otherwise diminishes its value below the value when respondent acquired it.

[9] The power of initiative or referendum may be reserved or conferred "with respect to any matter, legislative or administrative, within the realm of local affairs . . . ." 5 E. McQuillan, Municipal Corporations § 16.54, p. 208 (3d ed., 1969). However, the Ohio Supreme Court concluded that only land use changes granted by the City Council when acting in a *legislative* capacity were subject to the referendum process. Under the court's binding interpretation of state law, a property owner seeking relief from unnecessary hardship occasioned by zoning restrictions would not be subject to Eastlake's referendum procedure. For example, if unforeseeable future changes give rise to hardship on the owner, the holding of the Ohio Supreme Court provides avenues of administrative relief not subject to the referendum process.

II

The Ohio Supreme Court further concluded that the amendment to the city charter constituted a "delegation" of power violative of federal constitutional guarantees because the voters were given no standards to guide their decision. Under Eastlake's procedure, the Ohio Supreme Court reasoned, no mechanism existed, nor indeed could exist, to assure that the voters would act rationally in passing upon a proposed zoning change. This meant that "appropriate legislative action [would] be made dependent upon the potentially arbitrary and unreasonable whims of the voting public." 41 Ohio St. 2d, at 195, 324 N. E. 2d, at 746. The potential for arbitrariness in the process, the court concluded, violated due process.

Courts have frequently held in other contexts that a congressional delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will. See, *e. g., Yakus* v. *United States,* 321 U. S. 414 (1944); *Amalgamated Meat Cutters* v. *Connally,* 337 F. Supp. 737 (DC 1971). Cf. *FEA* v. *Algonquin SNG, ante,* p. 548. See generally 8 E. McQuillan, Municipal Corporations § 25.161, pp. 521–522 (3d ed. 1965); Note, 1972 Duke L. J. 122. Assuming, *arguendo,* their relevance to state governmental functions, these cases involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the people; this doctrine is inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves.[10]

[10] The Ohio Supreme Court's analysis of the requirements for standards flowing from the Fourteenth Amendment also sweeps too broadly. Except as a legislative history informs an analysis

In basing its claim on federal due process requirements, respondent also invokes *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), but it does not rely on the direct teaching of that case. Under *Euclid*, a property owner can challenge a zoning restriction if the measure is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*, at 395. If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction. As this Court held in invalidating a charter amendment enacted by referendum:

> "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Hunter* v. *Erickson*, 393 U. S., at 392.

See also *Lucas* v. *Colorado Gen. Assembly*, 377 U. S. 713, 736–737 (1964); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624, 638 (1943).

But no challenge of the sort contemplated in *Euclid* v. *Ambler Realty* is before us. The Ohio Supreme Court did not hold, and respondent does not argue, that the present zoning classification under Eastlake's comprehen-

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of legislative action, there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters. For example, there is no certainty that the City Council in this case would act on the basis of "standards" explicit or otherwise in Eastlake's comprehensive zoning ordinance. Nor is there any assurance that townspeople assembling in a town meeting, as the people of Eastlake could do, *Hunter* v. *Erickson*, 393 U. S. 385, 392 (1969), will act according to consistent standards. The critical constitutional inquiry, rather, is whether the zoning restriction produces arbitrary or capricious results.

sive ordinance violates the principles established in *Euclid* v. *Ambler Realty.* If respondent considers the referendum result itself to be unreasonable, the zoning restriction is open to challenge in state court, where the scope of the state remedy available to respondent would be determined as a matter of state law, as well as under Fourteenth Amendment standards. That being so, nothing more is required by the Constitution.[11]

Nothing in our cases is inconsistent with this conclusion. Two decisions of this Court were relied on by the Ohio Supreme Court in invalidating Eastlake's procedure. The thread common to both decisions is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a *narrow segment* of the community, not to the people at large. In *Eubank* v. *Richmond,* 226 U. S. 137 (1912), the Court invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two-thirds of the property abutting any street. Similarly, in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116 (1928), the Court struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.[12]

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[11] The Supreme Court of Ohio rested its decision solely on the Due Process Clause of the Fourteenth Amendment. See 41 Ohio St. 2d 187, 196, 324 N. E. 2d 740, 746 (1975). The only questions presented to this Court in the petition for certiorari concern the validity of that due process holding. Pet. for Cert. 2. Accordingly, we confine ourselves to considering whether due process is denied by the challenged charter amendment.

[12] The Ohio Supreme Court also considered this Court's decision in *Thomas Cusack Co.* v. *Chicago,* 242 U. S. 526 (1917). In contrast to *Eubank* and *Roberge,* the *Cusack* Court *upheld* a neighborhood

Neither *Eubank* nor *Roberge* involved a referendum procedure such as we have in this case; the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process. The Court of Appeals for the Ninth Circuit put it this way:

> "A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." *Southern Alameda Spanish Speaking Organization* v. *Union City, California,* 424 F. 2d 291, 294 (1970).

Our decision in *James* v. *Valtierra,* upholding California's mandatory referendum requirement, confirms this view. Mr. Justice Black, speaking for the Court in that case, said:

> "This procedure ensures that *all the people* of a community will have a voice in a decision which may lead to large expenditures of local governmental

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consent provision which permitted property owners to waive a municipal restriction prohibiting the construction of billboards. This Court in *Cusack* distinguished *Eubank* in the following way:

"[The ordinance in *Eubank*] left the establishment of the building line untouched until the lot owners should act and then . . . gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards . . . but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification." 242 U. S., at 531.

Since the property owners could simply waive an otherwise applicable legislative limitation, the Court in *Cusack* determined that the provision did not delegate legislative power at all. *Ibid.*

> funds for increased public services . . . ." 402 U. S., at 143 (emphasis added).

Mr. Justice Black went on to say that a referendum procedure, such as the one at issue here, is a classic demonstration of "devotion to democracy . . . ." *Id.*, at 141. As a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance.[13] Since the rezoning decision in this case was properly reserved to the people of Eastlake under the Ohio Constitution, the Ohio Supreme Court erred in holding invalid, on federal constitutional grounds, the charter amendment permitting the voters to decide whether the zoned use of respondent's property could be altered.

The judgment of the Ohio Supreme Court is reversed,

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[13] The fears expressed in dissent rest on the proposition that the procedure at issue here is "fundamentally unfair" to landowners; this fails to take into account the mechanisms for relief potentially available to property owners whose desired land use changes are rejected by the voters. First, if hardship is occasioned by zoning restrictions, *administrative* relief is potentially available. Indeed, the very purpose of "variances" allowed by zoning officials is to avoid "practical difficulties and unnecessary hardship." 8 E. McQuillan, Municipal Corporations § 25.159, p. 511 (3d ed. 1965). As we noted, *supra*, at 677, remedies remain available under the Ohio Supreme Court's holding and provide a means to challenge unreasonable or arbitrary action. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

The situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to *change* a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner's seeking approval of a new use free from the restrictions attached to the land when it was acquired.

and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE POWELL, dissenting.

There can be no doubt as to the propriety and legality of submitting generally applicable legislative questions, including zoning provisions, to a popular referendum. But here the only issue concerned the status of a single small parcel owned by a single "person." This procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair. The "spot" referendum technique appears to open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

The city's reliance on the town meeting process of decisionmaking tends to obfuscate the two critical issues in this case. These issues are (1) whether the procedure which a city employs in deciding to grant or to deny a property owner's request for a change in the zoning of his property must comply with the Due Process Clause of the Fourteenth Amendment; and (2) if so, whether the procedure employed by the city of Eastlake is fundamentally fair?

I

We might rule in favor of the city on the theory that the referendum requirement did not deprive respondent of any interest in property and therefore the Due Process Clause is wholly inapplicable.[1] After all, when respond-

[1] The Fourteenth Amendment provides: "No State shall . . . deprive any person of . . . property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1.

ent bought this parcel, it was zoned for light industrial use and it still retains that classification. The Court does not adopt any such rationale; nor, indeed, does the city even advance that argument. On the contrary, throughout this litigation everyone has assumed, without discussing the problem, that the Due Process Clause does apply. Both reason and authority support that assumption.[2]

Subject to limitations imposed by the common law of nuisance and zoning restrictions, the owner of real property has the right to develop his land to his own economic advantage. As land continues to become more scarce, and as land use planning constantly becomes more sophisticated, the needs and the opportunities for unforeseen uses of specific parcels of real estate continually increase. For that reason, no matter how comprehensive a zoning plan may be, it regularly contains some mechanism for granting variances, amendments, or exemptions for specific uses of specific pieces of property.[3] No re-

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[2] The Ohio Supreme Court opinion is reported at 41 Ohio St. 2d 187, 324 N. E. 2d 740 (1975).

[3] "Zoning maps are constantly being changed, for various reasons; and the question is, under what circumstances are such changes justified? . . . The problem is then to develop criteria for distinguishing valid from invalid zoning changes . . . ." 1 N. Williams, American Land Planning Law 6 (1974).

"Legally, all zoning enabling acts contemplate the possibility of dezoning, the power to amend zoning ordinances serving that purpose. The provisions do not show on their face whether they are intended to remedy particular errors or hardships, or whether they contemplate readjustments called for by the changing character of neighborhoods; undoubtedly, however, they may be made available for either purpose." Freund, Some Inadequately Discussed Problems of the Law of City Planning and Zoning, 24 Ill. L. Rev. 135, 145 (1929).

"For most communities, zoning as long range planning based on generalized legislative facts without regard to the individual facts has proved to be a theoretician's dream, soon dissolved in a

sponsibly prepared plan could wholly deny the need for presently unforeseeable future change.[4]

A zoning code is unlike other legislation affecting the use of property. The deprivation caused by a zoning code is customarily qualified by recognizing the property owner's right to apply for an amendment or variance to accommodate his individual needs. The expectancy that particular changes consistent with the basic zoning plan will be allowed frequently and on their merits is a normal incident of property ownership. When the governing body offers the owner the opportunity to seek such a change—whether that opportunity is denominated a privilege or a right—it is affording protection to the owner's interest in making legitimate use of his property.

The fact that an individual owner (like any other petitioner or plaintiff) may not have a legal right to the relief he seeks does not mean that he has no right to fair procedure in the consideration of the merits of his application. The fact that codes regularly provide a procedure for granting individual exceptions or changes, the fact that such changes are granted in individual cases with great frequency, and the fact that the particular code in the record before us contemplates that changes consistent with the basic plan will be allowed, all sup-

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series of zoning map amendments, exceptions and variances—reflecting, generally, decisions made on individual grounds—brought about by unanticipated and often unforeseeable events: social and political changes, ecological necessity, location and availability of roads and utilities, economic facts (especially costs of construction and financing), governmental needs, and, as important as any, market and consumer choice." *Kropf* v. *City of Sterling Heights*, 391 Mich. 139, 168, 215 N. W. 2d 179, 191–192 (1974).

[4] "Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." *National Land & Investment Co.* v. *Easttown Township Bd. of Adjustment*, 419 Pa. 504, 528, 215 A. 2d 597, 610 (1965).

port my opinion that the opportunity to apply for an amendment is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment.

This conclusion is supported by the few cases in this Court which have decided zoning questions, and by many well-reasoned state-court decisions. In both *Eubank* v. *City of Richmond*, 226 U. S. 137, and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, the Court invalidated ordinances for procedural reasons. In *Eubank* the Court held that the method of imposing a building-line restriction on a property owner was defective. In *Roberge*, which is more analogous to this case, the Court invalidated the requirement that the owners of two-thirds of the property within 400 feet must give their approval to the plaintiff's proposed use of his property. Implicitly, both cases hold that the process of making decisions affecting the use of particular pieces of property must meet constitutional standards.[5]

Although this Court has decided only a handful of zoning cases, literally thousands of zoning disputes have been resolved by state courts. Those courts have repeatedly identified the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels. In the former situation there is generally great deference to the judgment of the

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[5] The majority distinguished these cases on the ground that "the standardless delegation of power to a limited group of property owners . . . is not to be equated with decisionmaking by the people through the referendum process." *Ante*, at 678. Whether or not that is a sufficient distinction of those cases insofar as they deal with the adequacy of the city's procedure, the distinction does not undermine their support for the proposition that the city's procedure must afford the property owner due process.

legislature; in the latter situation state courts have not hesitated to correct manifest injustice.

The distinction was plainly drawn by the Supreme Court of Oregon:

> "Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test." *Fasano* v. *Board of County Comm'rs*, 264 Ore. 574, 580–581, 507 P. 2d 23, 26 (1973).

And the Supreme Court of Washington made the point in this way:

> "Zoning decisions may be either administrative or legislative depending upon the nature of the act. But, whatever their nature or the importance of their categorization for other purposes, zoning decisions which deal with an amendment of the code or reclassification of land thereunder must be arrived at fairly. The process by which they are made, subsequent to the adoption of a comprehensive plan and a zoning code, is basically adjudicatory.
>
> "Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of pub-

> lic policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally." *Fleming* v. *City of Tacoma*, 81 Wash. 2d 292, 298–299, 502 P. 2d 327, 331 (1972) (citations omitted).[6]

Specialists in the practice of zoning law are unhappily familiar with the potential for abuse which exists when inadequate procedural safeguards apply to the dispensation of special grants. The power to deny arbitrarily may give rise to the power to exact intolerable conditions.[7] The insistence on fair procedure in this area

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[6] *Fleming* was followed by the Supreme Court of Colorado: "Although our early decisions viewed the enactment of *rezoning* ordinances as a legislative function, the more recent decisions have held such activity to be a quasi-judicial function and reviewable under Rule 106 (a)(4). In so doing, we have distinguished between the adjudicative process involved in enacting a *rezoning* ordinance and the legislative process involved in passing the general zoning ordinance. This distinction was concisely drawn by the Supreme Court of Washington in *Fleming* v. *Tacoma*, 81 Wash. 2d 292, 502 P. 2d 327 (1972)." *Snyder* v. *City of Lakewood*, — Colo. —, 542 P. 2d 371, 373–374 (1975) (footnotes omitted).

[7] One expert on zoning matters has made the following comment: "The freedom from accountability of the municipal governing body may be tolerable in those cases where the legislature is engaged in legislating but it makes no sense where the legislature is dispensing or refusing to dispense special grants. When the local legislature acts to pass general laws applicable generally it is performing its traditional role and it is entitled to be free from those strictures we place upon an agency that is charged with granting or denying special privileges to particular persons. When the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency." R. Babcock, The Zoning Game 158 (1966). Compare this comment with the practice of another "zoning man." See *United States* v. *Staszcuk*, 517 F. 2d 53, 56 (CA7 1975).

of the law falls squarely within the purpose of the Due Process Clause of the Fourteenth Amendment.

II

When we examine a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process, the fact that a State may give it a "legislative" label should not save an otherwise invalid procedure. We should, however, give some deference to the conclusion of the highest court of the State that the procedure represents an arbitrary and unreasonable way of handling a local problem.

In this case, the Ohio courts arrived at the conclusion that Art. VIII, § 3, of the charter of the city of Eastlake, as amended on November 2, 1971, is wholly invalid in three stages.[8] At no stage of the case has

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[8] This exceptional bit of legislation is worth reading in its entirety:

"SECTION 3. MANDATORY REFERRAL

"That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land and the selling or leasing or rental of parkways, playgrounds, or other city lands or real property, or for the widening, narrowing, re-locating, vacating, or changing the use of any public street, avenue, boulevard, or alley cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council should approve any of the preceding changes, or enactments, whether . . . approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a

there been any suggestion that respondent's proposed use of its property would be inconsistent with the city's basic zoning plan,[9] or would have any impact on the

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change of an existing land use by the Council for an applicant, and the applicant agrees to assume all costs of the election and post bond with the city Auditor in an amount estimated by the County Auditor or the Board of Elections proportionate with any other issues that may be on the ballot at the same time. The applicant shall further agree to authorize the City Auditor to advertise, and assume the obligations to pay, for a notice of the posted bond and the requested land use change in a newspaper of general circulation, whose circulation is either the largest, or second to the largest within the limits of the City for two consecutive times, with at least two weeks between notices and a third notice one week prior to the election. Should the land use request not be affirmed by a 55% favorable vote it cannot be presented again for one full year and a new request must be made at that time.

"It shall be the duty of any applicant for a land use change to obtain zoning codes, maps, thoroughfare and sewer plans or advice of the city council and officials and approving bodies for interpretation of this section as they are always available. If this section is violated and a building is under construction or completely constructed it shall be mandatory for the Mayor, Safety Director, Service Director and Building Inspector equally to have the building or structure removed completely within 60 days at the owner[']s expense as these officials are charged with the enforcement of this section. It shall be mandatory that the City Council charge and fund the Planning Commission to have on display at all times in the council chambers and available to the public a zone map, showing a legend and summary of zoning regulations by district, [m]ajor use, [m]inimum and maximum lot width and that each district, city park, playground, and city lands be accurately located and identified with the date of adoption and the date of revisions to date. Any and all revisions will be posted to the zone map within 90 days of their occurrence. Maps shall be available to each land owner of the city for a nominal cost not to exceed $2.50 each on demand. Maps shall be available within six months of this charter change."

[9] Both the City Planning Commission and the City Council expressly approved the proposal.

municipal budget or adversely affect the city's potential economic development.[10]

First, the requirement that the property owner pay the cost of the special election was invalidated in the trial court and in the Ohio Court of Appeals.[11] Second, the Ohio Supreme Court held that the mandatory referendum was "clearly invalid" insofar as it purported to apply to a change in land use approved by the City Council "in an administrative capacity." Without explaining when the Council's action is properly characterized as legislative instead of administrative, the court then held that even though its approval in this case was legislative, the entire referendum requirement was invalid. The court reasoned:

> "Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal

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[10] There is no support in the record for the speculation in the Court's opinion, *ante*, at 673 n. 7, that the land use change "would likely entail the provision of additional city services, such as schools and police and fire protection." It seems equally likely that the residents of Eastlake who might move into the new development would also receive such services if they lived elsewhere. Nor is there any support for the speculation that the "change would also diminish the land area available for industrial purposes, thereby affecting Eastlake's potential economic development." If that speculation were accurate, it is surprising that the Planning Commission and the Council approved the change.

[11] Indeed, the city never even tried to enforce that requirement; for when respondent refused to post the bond to cover the cost, the city went ahead and held the election anyway.

government. *McGautha* v. *California* (1971), 402 U. S. 183, 256, 270. The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational. For these reasons, the provision clearly violates the due process clause of the Fourteenth Amendment." 41 Ohio St. 2d 187, 196, 324 N. E. 2d 740, 746 (1975) (footnote omitted).

The concurring opinion expressed additional reasons for regarding the referendum requirement as arbitrary. Speaking for four members of the Ohio Supreme Court, Justice Stern stated:

"There can be little doubt of the true purpose of Eastlake's charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. The charter provision was apparently adopted specifically, to prevent multi-family housing, and indeed was adopted while Forest City's application for rezoning to permit a multi-family housing project was pending before the City Planning Commission and City Council. The restrictive purpose of the provision is crudely apparent on its face. Any zoning change, regardless of how minor, and regardless of its approval by the Planning Commission and the City Council, must be approved by a city-wide referendum. The proposed change must receive, rather than a simple majority, at least a 55 percent affirmative vote. Finally, the owner of the property affected is required to pay the cost of the election, although the provision gives no hint as to exactly which costs would be billed to a property owner.

"There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.

> "Even stripped of its harsher provisions the charter provision poses serious problems. A mandatory, city-wide referendum which applies to any zoning change must, of necessity, submit decisions that affect one person's use of his property to thousands of voters with no interest whatever in that property. We need only imagine the adoption of this same provision in a city such as Cleveland. By such a provision, rezoning for a corner gasoline station would require the approval of hundreds of thousands of voters, most of them living miles away, and few of them with the slightest interest in the matter. This would be government by caprice, and would seriously dilute the right of private ownership of property. The law recognizes that the use a person makes of his property must inevitably affect his neighbors and, in some cases, the surrounding community. These real interests are entitled to be balanced against the rights of a property owner; but a law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose." *Id.*, at 199–200, 324 N. E. 2d, at 748–749.

As the Justices of the Ohio Supreme Court recognized, we are concerned with the fairness of a provision for determining the right to make a particular use of a particular parcel of land. In such cases, the state courts have frequently described the capricious character of a decision supported by majority sentiment rather than reference to articulable standards.[12] Moreover, they have limited

[12] "But in restricting individual rights by exercise of the police power neither a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of

statutory referendum procedures to apply only to approvals of comprehensive zoning ordinances as opposed to amendments affecting specific parcels.[13] This conclusion has been supported by characterizing particular amendments as "administrative" and revision of an entire plan as "legislative." [14]

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neighbors or for their benefit. . . ." *Benner* v. *Tribbitt,* 190 Md. 6, 20, 57 A. 2d 346, 353 (1948).

"The determination of a petition for a variance cannot be determined by a poll of the sentiment of the neighborhood." *Town of Homecroft* v. *Macbeth,* 238 Ind. 57, 62–63, 148 N. E. 2d 563, 566 (1958).

"It is also not a proper exercise of such authority to base their decision [on a rezoning] merely on 'strenuous objections of residents of the Town' as [the Board] does in reason (3). Such remonstrances may be heard and taken into consideration but they may not be permitted to control the board's decision. *Heffernan* v. *Zoning Board,* 50 R. I. 26, 144 A. 674. A poll of the neighborhood to weigh the conflicting wishes of the residents or landowners in the vicinity is not the purpose of the hearing." *Kent* v. *Zoning Board of Town of Barrington,* 74 R. I. 89, 92, 58 A. 2d 623, 624 (1948).

"*Rather, the comprehensive plan is the essence of zoning.* Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll." (Emphasis added.) *Udell* v. *Haas,* 21 N. Y. 2d 463, 469, 235 N. E. 2d 897, 900–901 (1968).

[13] "While the referendum provision of the statute has not heretofore been construed by this court, we believe that the reasonable and proper construction of the statute supports the position of the plaintiff to the effect that the referendum-election provision applies only to a comprehensive type of zoning ordinance and does not apply to an altering or amending ordinance." *Minneapolis-Honeywell Regulator Co.* v. *Nadasdy,* 247 Minn. 159, 165, 76 N. W. 2d 670, 675 (1956).

[14] "The issue is whether an amendment to a city zoning ordinance changing the zoning of particular property is subject to a referendary vote of the electors of the city.

"We hold that such a change in zoning is not subject to referen-

In this case the Ohio Supreme Court characterized the Council's approval of respondent's proposal as "legislative." I think many state courts would have characterized it as "administrative." The courts thus may well differ in their selection of the label to apply to this action, but I find substantial agreement among state tribunals on the proposition that requiring a citywide referendum for approval of a particular proposal like this is manifestly unreasonable. Surely that is my view.

The essence of fair procedure is that the interested parties be given a reasonable opportunity to have their

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dum. The right of referendum extends only to legislative acts. A change in the zoning of particular property, although in form (amendment of a zoning ordinance) and in traditional analysis thought to be legislative action, is in substance an administrative, not legislative, act." *West* v. *City of Portage*, 392 Mich. 458, 460–461, 221 N. W. 2d 303, 304 (1974).

"An ordinance changing the classification of property from residential to business use after the adoption of a comprehensive zoning plan is an administrative or executive matter, and not subject to referendum laws applicable to municipalities." *Kelley* v. *John*, 162 Neb. 319, 75 N. W. 2d 713, 714 (1956) (syllabus by the court).

"The City of Washington Terrace has in effect a master zoning plan ordinance. Subsequent to its adoption, the City Council passed an ordinance changing the classification of certain property from residential to commercial use. . . .

"The ordinance in question was passed after the requested change had been studied and recommended by the planning commission and after a public hearing had been held. The determinative question is whether or not the action of the City Council *was administrative or legislative. If the former, it is not subject to referendum.* We so hold, based upon logic and prior decisions of this court. *If each change in a zoning classification were to be submitted to a vote of the city electors, any master plan would be rendered inoperative. Such changes are administrative acts implementing the comprehensive plan and adjusting it to current conditions.*" (Emphasis added.) *Bird* v. *Sorenson*, 16 Utah 2d 1–2, 394 P. 2d 808 (1964).

dispute resolved on the merits by reference to articulable rules. If a dispute involves only the conflicting rights of private litigants, it is elementary that the decisionmaker must be impartial and qualified to understand and to apply the controlling rules.

I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy.[15] I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants. The problem presented by this case is unique, because it may involve a three-sided controversy, in which there is at least potential conflict between the rights of the property owner and the rights of his neighbors, and also potential conflict with the public interest in preserving the city's basic zoning plan. If the latter aspect of the controversy were predominant, the referendum would be an acceptable procedure. On the other hand, when the record indicates without contradiction that there is no threat to the general public interest in preserving the city's plan—as it does in this case, since respondent's proposal was approved by both the Planning Commission and the City Council and there has been no allegation that the use of this eight-acre parcel for apartments rather than light industry would adversely affect the community or raise any policy issue of citywide concern—I think the case should be treated as one in which it is essential that the private property owner be given

[15] *James* v. *Valtierra*, 402 U. S. 137, sustained the "use of referendums to give citizens a voice on questions of public policy." *Id.*, at 141. The approval of a publicly financed housing project, which might "lead to large expenditures of local governmental funds for increased public services and to lower tax revenues," *id.*, at 143, raises policy questions not involved in a zoning change for a private property owner. That case presented no due process or other procedural issue.

a fair opportunity to have his claim determined on its merits.

As Justice Stern points out in his concurring opinion, it would be absurd to use a referendum to decide whether a gasoline station could be operated on a particular corner in the city of Cleveland. The case before us is not that clear because we are told that there are only 20,000 people in the city of Eastlake. Conceivably, an eight-acre development could be sufficiently dramatic to arouse the legitimate interest of the entire community; it is also conceivable that most of the voters would be indifferent and uninformed about the wisdom of building apartments rather than a warehouse or factory on these eight acres. The record is silent on which of these alternatives is the more probable. Since the ordinance places a manifestly unreasonable obstacle in the path of every property owner seeking any zoning change, since it provides no standards or procedures for exempting particular parcels or claims from the referendum requirement, and since the record contains no justification for the use of the procedure in this case, I am persuaded that we should respect the state judiciary's appraisal of the fundamental fairness of this decisionmaking process in this case.[16]

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[16] The final footnote in the Court's opinion identifies two reasons why the referendum procedure is not fundamentally unfair. Both reasons are consistent with my assumption that there is virtually no possibility that an individual property owner could be expected to have his application for a proposed land use change decided on the merits.

The first of the Court's reasons is that if "hardship" is shown, "*administrative* relief is potentially available"; that "potential" relief, however, applies only to some undefined class of claims that does not include this respondent's. A procedure in one case does not become constitutionally sufficient because some other procedure might be available in some other case.

The second of the Court's reasons is that there is a judicial

I therefore conclude that the Ohio Supreme Court correctly held that Art. VIII, § 3, of the Eastlake charter violates the Due Process Clause of the Fourteenth Amendment, and that its judgment should be affirmed.

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remedy available if the zoning ordinance is so arbitrary that it is invalid on substantive due process grounds. This reason is also inapplicable to this case. There is no claim that the city's zoning plan is arbitrary or unconstitutional, even as applied to respondent's parcel. But if there is a constitutional right to fundamental fairness in the procedure applicable to an ordinary request for an amendment to the zoning applicable to an individual parcel, that right is not vindicated by the opportunity to make a substantive due process attack on the ordinance itself.

SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES OF AMERICA AND CANADA ET AL. *v.* MILIVOJEVICH ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 75–292. Argued March 22, 1976—Decided June 21, 1976

During the course of a protracted dispute over the control of the Serbian Eastern Orthodox Diocese for the United States and Canada, the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church (Mother Church) suspended and ultimately removed and defrocked the Bishop, respondent Dionisije, and appointed petitioner Firmilian as Administrator of the Diocese, which the Mother Church then reorganized into three Dioceses. The Serbian Orthodox Church is a hierarchical church, and the sole power to appoint and remove its Bishops rests in the Holy Assembly and Holy Synod. Dionisije filed suit in the Illinois courts seeking to enjoin petitioners from interfering with Diocesan assets of respondent not-for-profit Illinois corporations and to have himself declared the true Diocesan Bishop. After a lengthy trial, the trial court resolved most of the disputed issues in favor of petitioners. The Supreme Court of Illinois affirmed in part and reversed in part, holding that Dionisije's removal and defrockment had to be set aside as "arbitrary" because the proceedings against him had not in its view been conducted in accordance with the Church's constitution and penal code, and that the Diocesan reorganization was invalid because it exceeded the scope of the Mother Church's authority to effectuate such changes without Diocesan approval. *Held:*

1. The holding of the Illinois Supreme Court constituted improper judicial interference with the decisions of a hierarchical church and in thus interposing its judgment into matters of ecclesiastical cognizance and polity, the court contravened the First and Fourteenth Amendments. Pp. 708–725.

(a) "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding . . . ." *Watson* v. *Jones*, 13 Wall. 679, 727. Pp. 708–712.

(b) Under the guise of "minimal" review of the Mother

Church's decisions that the Illinois Supreme Court deemed "arbitrary" that court has unconstitutionally undertaken the adjudication of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church. Pp. 712–720.

2. Though it did not rely on the "fraud, collusion, or arbitrariness" exception to the rule requiring recognition by civil courts of decisions by hierarchical tribunals, but rather on purported "neutral principles" for resolving property disputes in reaching its conclusion that the Mother Church's reorganization of the American-Canadian Diocese into three Dioceses was invalid, that conclusion also contravened the First and Fourteenth Amendments. The reorganization of the Diocese involves solely a matter of internal church government, an issue at the core of ecclesiastical affairs. Religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 116. Pp. 720–724.

60 Ill. 2d 477, 328 N. E. 2d 268, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 725. BURGER, C. J., concurred in the judgment. REHNQUIST, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 725.

Albert E. Jenner, Jr., argued the cause for petitioners. With him on the briefs were *Keith F. Bode, Robert L. Graham, Thomas J. Karacic,* and *Henry D. Fisher.*

Leo J. Sullivan III argued the cause for respondents. With him on the brief were *Richard J. Smith* and *Jerome H. Torshen.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1963, the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church (Mother Church)

**Don H. Reuben, Lawrence Gunnels,* and *James A. Serritella* filed a brief for the Catholic Bishop of Chicago as *amicus curiae.*

suspended and ultimately removed respondent Dionisije Milivojevich (Dionisije) as Bishop of the American-Canadian Diocese of that Church, and appointed petitioner Bishop Firmilian Ocokoljich (Firmilian) as Administrator of the Diocese, which the Mother Church then reorganized into three Dioceses. In 1964 the Holy Assembly and Holy Synod defrocked Dionisije as a Bishop and cleric of the Mother Church. In this civil action brought by Dionisije and the other respondents in Illinois Circuit Court, the Supreme Court of Illinois held that the proceedings of the Mother Church respecting Dionisije were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid. The State Supreme Court also invalidated the Diocesan reorganization into three Dioceses. 60 Ill. 2d 477, 328 N. E. 2d 268 (1975).[1] We granted certiorari to determine whether the actions of the Illinois Supreme Court constituted improper judicial interference with decisions of the highest authorities of a hierarchical church in violation of the First and Fourteenth Amendments. 423 U. S. 911 (1975). We hold that the inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity and the court's actions pursuant thereto contravened the First and Fourteenth Amendments. We therefore reverse.

I

The basic dispute is over control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada (American-Canadian Diocese), its property and assets. Petitioners are Bishops Firmilian, Gregory Udicki, and Sava Vukovich, and the Serbian Eastern

[1] The opinion of the Illinois Appellate Court in an earlier appeal is reported *sub nom. Serbian Orthodox Diocese* v. *Ocokoljich*, 72 Ill. App. 2d 444, 219 N. E. 2d 343 (1966).

Orthodox Diocese for the United States of America and Canada (the religious body in this country). Respondents are Bishop Dionisije, the Serbian Orthodox Monastery of St. Sava, and the Serbian Eastern Orthodox Diocese for the United States of America and Canada, an Illinois religious corporation. A proper perspective on the relationship of these parties and the nature of this dispute requires some background discussion.

The Serbian Orthodox Church, one of the 14 autocephalous, hierarchical churches which came into existence following the schism of the universal Christian church in 1054, is an episcopal church whose seat is the Patriarchate in Belgrade, Yugoslavia. Its highest legislative, judicial, ecclesiastical, and administrative authority resides in the Holy Assembly of Bishops, a body composed of all Diocesan Bishops presided over by a Bishop designated by the Assembly to be Patriarch. The Church's highest executive body, the Holy Synod of Bishops, is composed of the Patriarch and four Diocesan Bishops selected by the Holy Assembly. The Holy Synod and the Holy Assembly have the exclusive power to remove, suspend, defrock, or appoint Diocesan Bishops. The Mother Church is governed according to the Holy Scriptures, Holy Tradition, Rules of the Ecumenical Councils, the Holy Apostles, the Holy Faiths of the Church, the Mother Church Constitution adopted in 1931, and a "penal code" adopted in 1961. These sources of law are sometimes ambiguous and seemingly inconsistent. Pertinent provisions of the Mother Church Constitution provide that the Church's "main administrative division is composed of dioceses, both in regard to church hierarchical and church administrative aspect," Art. 12, and that "[d]ecisions of establishing, naming, liquidating, reorganizing, and the seat of the dioceses, and establishing or eliminating of position of vicar bish-

ops, is decided upon by the [Holy Assembly], in agreement with the Patriarchal Council," Art. 16.

During the late 19th century, migrants to North America of Serbian descent formed autonomous religious congregations throughout this country and Canada. These congregations were then under the jurisdiction of the Russian Orthodox Church, but that Church was unable to care for their needs and the congregations sought permission to bring themselves under the jurisdiction of the Serbian Orthodox Church.

In 1913 and 1916, Serbian priests and laymen organized a Serbian Orthodox Church in North America. The 32 Serbian Orthodox congregations were divided into 4 presbyteries, each presided over by a Bishop's Aide, and constitutions were adopted. In 1917, the Russian Orthodox Church commissioned a Serbian priest, Father Mardary, to organize an independent Serbian Diocese in America. Four years later, as a result of Father Mardary's efforts, the Holy Assembly of Bishops of the Mother Church created the Eastern Orthodox Diocese for the United States of America and Canada and designated a Serbian Bishop to complete the formal organization of a Diocese. From that time until 1963, each Bishop who governed the American-Canadian Diocese was a Yugoslav citizen appointed by the Mother Church without consultation with Diocesan officials.

In 1927, Father Mardary called a Church National Assembly embracing all of the known Serbian Orthodox congregations in the United States and Canada. The Assembly drafted and adopted the constitution of the Serbian Orthodox Diocese for the United States of America and Canada, and submitted the constitution to the Mother Church for approval. The Holy Assembly made changes to provide for appointment of the Diocesan Bishop by the Holy Assembly and to require Holy As-

sembly approval for any amendments to the constitution, and with these changes approved the constitution. The American-Canadian Diocese was the only diocese of the Mother Church with its own constitution.

Article 1 of the constitution provides that the American-Canadian Diocese "is considered ecclesiastically-judicially as an organic part of the Serbian Patriarchate in the Kingdom of Yugoslavia," and Art. 2 provides that all "statutes and rules which regulate the ecclesiastical-canonical authority and position of the Serbian Orthodox Church in the Kingdom of Yugoslavia are also compulsory for" the American-Canadian Diocese. Article 3 states that the "jurisdiction of the . . . Diocese . . . includes the entire political territory of the United States of America and Canada, which as such by its geographical location enjoys full administrative freedom and accordingly, it can independently regulate and rule the activities of its church, school and other diocesan institutions and all funds and beneficiencies, through its organs . . . ." Article 9 provides that the Bishop of the Diocese "is appointed by the Holy Assembly of Bishops of the Serbian Patriarchate"; various provisions of the constitution accord that Bishop extensive powers with respect to both religious matters and control of Diocesan property. The constitution also provides for such Diocesan organs as a Diocesan National Assembly, which exercises considerable legislative and administrative authority within the Diocese.

In 1927, Father Mardary also organized a not-for-profit corporation, the Serbian Eastern Orthodox Council for the United States and Canada, under the laws of Illinois. The corporation was to hold title to 30 acres of land in Libertyville, Ill., that Father Mardary had personally purchased in 1924. The charter of that corporation was allowed to lapse, and Father Mardary organized

another Illinois not-for-profit corporation, respondent Serbian Eastern Orthodox Diocese for the United States and Canada, under Illinois laws governing incorporation of hierarchical religious organizations. In 1945, respondent not-for-profit monastery corporation, the Monastery of St. Sava, was organized under these same Illinois laws, and title to the Libertyville property was transferred to it. Similar secular property-holding corporations were subsequently organized in New York, California, and Pennsylvania.

Respondent Bishop Dionisije was elected Bishop of the American-Canadian Diocese by the Holy Assembly of Bishops in 1939. He became a controversial figure; during the years before 1963, the Holy Assembly received numerous complaints challenging his fitness to serve as Bishop and his administration of the Diocese.

During his tenure, however, the Diocese grew so substantially that Dionisije requested that the Patriarch and Holy Assembly appoint bishops to assist him but to serve under his supervision. Eventually, the Diocese sought its elevation by the Holy Assembly to the rank of Metropolia, that South America be added to the Diocese, and that several assistant bishops be appointed under Dionisije. Dionisije specifically recommended that petitioners Firmilian and Gregory Udicki, and one Stefan Lastavica be named assistant bishops. A delegation from the Diocese was sent to the May 1962 meeting of the Holy Assembly in Belgrade to urge adoption of these reorganization proposals, and on June 12, 1962, the Holy Synod appointed a delegation to visit the United States and study the proposals. The delegation was also directed to confer with Dionisije concerning the complaints made against him and his administration over the years.

The delegation remained in the United States for three

months, visiting parishes throughout the Diocese and discussing both the reorganization proposals and the complaints against Dionisije. After completion of its survey, the delegation suggested to the Holy Synod the assignment of vicar bishops to the Diocese and recommended that a commission be appointed to conduct a thorough investigation into the complaints against Dionisije. However, the Holy Assembly on May 10, 1963, instead recommended that the Holy Synod institute disciplinary proceedings against Dionisije. The Holy Synod thereupon met immediately and suspended Dionisije pending investigation and disposition of the complaints. The Holy Synod appointed petitioner Firmilian, Dionisije's chief episcopal deputy since 1955 and one of Dionisije's candidates for assistant bishop, as Administrator of the Diocese pending completion of the proceedings.

The Holy Assembly thereafter reconvened and, acting under Art. 16 of the constitution of the Mother Church, reorganized the American-Canadian Diocese into three new dioceses—the Middle Western, the Western, and the Eastern—whose boundaries were roughly those of the episcopal districts previously created by Dionisije.[2] The final fixing of boundaries for the new dioceses and all other organizational and administrative matters were left to be determined by the officials of the old American-Canadian Diocese. Dionisije was appointed Bishop of the Middle Western Diocese and, seven days later, petitioners Archimandrites Firmilian, Gregory, and Stefan[3] were appointed temporary administrators for the new Dioceses.

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[2] The Mother Church decided against creation of a "Metropolia" because it had not employed that organizational system and had not required one Bishop to serve under another.

[3] Stefan has since died, and the Holy Assembly appointed petitioner Sava Vukovich in his place.

Dionisije's immediate reaction to these decisions of the Mother Church was to refuse to accept the reorganization on the ground that it contravened the administrative autonomy of the Diocese guaranteed by the Diocesan constitution, and to refuse to accept his suspension on the ground that it was not effectuated in compliance with the constitution and laws of the Mother Church. On May 25, 1963, he prepared and mailed a circular to all American-Canadian parishes stating his refusal to recognize these actions, and on May 27 he issued a press release stating his refusal to recognize his suspension and his intent to litigate it in the civil courts. This refusal to recognize the Diocesan reorganization and his suspension as Bishop was again stated by Dionisije in a circular issued on June 3 and addressed to the Patriarch, the Holy Assembly, the Holy Synod, all clergy, congregations, Diocesan committees, and all Serbians in North America. He also continued to officiate as Bishop, refusing to turn administration of the Diocese over to Firmilian; in a May 30 letter to Firmilian, Dionisije repeated this refusal, asserted that he no longer recognized the decisions of the Holy Assembly and Holy Synod, and charged those bodies with being "communistic."

The Diocesan Council met on June 6, and Dionisije reaffirmed his refusal to turn over administration of the Diocese to Firmilian; he also announced that he had discharged two of his vicars general because of their loyalty to the Mother Church. The Council resolved at the meeting to advise the Holy Synod that the proposal to reorganize the Diocese into three dioceses would be submitted to the Diocesan National Assembly in August for acceptance or rejection. The Council also requested that the Holy Assembly promptly send a committee to investigate the complaints against Dionisije.

On June 13, the Holy Synod appointed such a commis-

sion, composed of two Bishops and the Secretary of the Holy Synod. On July 5, the commission met with Dionisije, who reiterated his refusal to recognize his suspension or the Diocesan reorganization, and who demanded all accusations in writing. The commission refused to give Dionisije the written accusations on the ground that defiance of decisions of higher church authorities itself established wrongful conduct, and advised him that the Holy Synod would appoint a Bishop as court prosecutor to prepare an indictment against him.

On the basis of the commission's report and recommendations, which recited Dionisije's refusal to accept the decisions of the Holy Synod and Holy Assembly and his refusal to recognize the court of the Holy Synod or its competence to try him, the Holy Assembly met on July 27, 1963, and voted to remove Dionisije as Bishop. The minutes of the Holy Assembly meeting and the Patriarch's letter to Dionisije informing him of the Holy Assembly's actions made clear that the removal was based solely on his acts of defiance subsequent to his May 10, 1963, suspension, and his violation of his oath and loss of certain qualifications for Bishop under Art. 104 of the constitution of the Mother Church.

The Diocesan National Assembly, with Dionisije presiding despite his removal, met in August 1963 and issued a resolution repudiating the division of the Diocese into three Dioceses and demanding a revocation by the Mother Church of the decisions concerning that division. When the Holy Assembly refused to reconsider, the Diocesan National Assembly in November 1963 declared the Diocese completely autonomous and reinstated the provisions of the Diocesan constitution that provided for election of the Bishop of the Diocese itself and for amendments without the approval of the Holy Assembly.

Meanwhile, the Holy Synod in October 1963 for-

warded to Dionisije a formal written indictment based on the charges of canonical misconduct. In November 1963, Dionisije responded with a demand for the verified reports and complaints referred to in the indictment and for a six-month extension to answer the indictment. The Holy Assembly granted a 30-day extension in which to answer, but declined to furnish verified charges on the grounds that they were described in the indictment, that additional details would be evidentiary in nature, and that there was no legal or canonical basis for forwarding such material to an accused Bishop.

Dionisije returned the indictment in January, refusing to answer without the verified charges, denouncing the Holy Assembly and Holy Synod as schismatic and pro-Communist, and asserting that the Mother Church was proceeding in violation of its penal code and constitution.

The Holy Synod, on February 25, 1964, declared that it could not proceed further without Dionisije and referred the matter to the Holy Assembly, which tried Dionisije as a default case on March 5, 1964, because of his refusal to participate. The indictment was also amended at that time to include charges based on Dionisije's acts of rebellion such as those committed at the November meeting of the National Assembly which had declared the Diocese separate from the Mother Church. Considering the original and amended indictments, the Holy Assembly unanimously found Dionisije guilty of all charges and divested him of his episcopal and monastic ranks.

Even before the Holy Assembly had removed Dionisije as Bishop, he had commenced what eventually became this protracted litigation, now carried on for almost 13 years. Acting upon the threat contained in his May 27, 1963, press release, Dionisije filed suit in

the Circuit Court of Lake County, Ill., on July 26, 1963, seeking to enjoin petitioners from interfering with the assets of respondent corporations and to have himself declared the true Diocesan Bishop. Petitioners countered with a separate complaint, which was consolidated with the original action, seeking declaratory relief that Dionisije had been removed as Bishop of the Diocese and that the Diocese had been properly reorganized into three Dioceses, and injunctive relief granting petitioner Bishops control of the reorganized Dioceses and their property. After the trial court granted summary judgment for respondents and dismissed petitioners' counter-complaint, the Illinois Appellate Court reversed and remanded for a hearing on the merits. *Serbian Orthodox Diocese* v. *Ocokoljich*, 72 Ill. App. 2d 444, 219 N. E. 2d 343, appeal denied, 34 Ill. 2d 631 (1966).[4]

Following a lengthy trial, the trial court filed an unreported memorandum opinion and entered a final decree which concluded that "no substantial evidence was produced . . . that fraud, collusion or arbitrariness existed in any of the actions or decisions preliminary to or during the final proceedings of the decision to defrock Bishop Dionisije made by the highest Hierarchical bodies of the Mother Church," Pet. for Cert., App. 44; that the property held by respondent corporations is held in trust for all members of the American-Canadian Diocese; that it was "improper and beyond the power of the Mother Church to take its action in dividing the whole American Diocese into three new Dioceses, changing its boundaries, and in appointing new bishops for

[4] The Appellate Court initially held that the suspension, removal, and defrockment of Dionisije were valid and binding upon the civil courts but on rehearing directed that Dionisije should be afforded the opportunity at trial to prove that these were the result of fraud, collusion, or arbitrariness.

said so-called new Dioceses," *id.*, at 46; and that "Firmilian was validly appointed by the Holy Episcopal Synod as temporary Administrator of the whole American Diocese in place of the defrocked Bishop Dionisije," *ibid.*

On appeal, the Supreme Court of Illinois affirmed in part and reversed in part, essentially holding that Dionisije's removal and defrockment had to be set aside as "arbitrary" because the proceedings resulting in those actions were not conducted according to the Illinois Supreme Court's interpretation of the Church's constitution and penal code, and that the Diocesan reorganization was invalid because it was beyond the scope of the Mother Church's authority to effectuate such changes without Diocesan approval. 60 Ill. 2d 477, 328 N. E. 2d 268 (1975). Although the court denied rehearing, it amended its original opinion to hold that, although Dionisije had been properly suspended, that suspension terminated by operation of church law when he was not validly tried within one year of his indictment. Thus, the court purported in effect to reinstate Dionisije as Diocesan Bishop.

II

The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide such disputes]. . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage.

To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine." *Md. & Va. Churches* v. *Sharpsburg Church,* 396 U. S. 367, 369 (1970) (BRENNAN, J., concurring). For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them. *Ibid.*

Resolution of the religious disputes at issue here affects the control of church property in addition to the structure and administration of the American-Canadian Diocese. This is because the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations. Resolution of the religious dispute over Dionisije's defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals. Even when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Because of this danger, "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Presbyterian Church* v. *Hull Church,* 393 U. S. 440, 449 (1969). "First Amend-

ment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." *Ibid.* This principle applies with equal force to church disputes over church polity and church administration.

The principles limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights were initially fashioned in *Watson* v. *Jones,* 13 Wall. 679 (1872), a diversity case decided before the First Amendment had been rendered applicable to the States through the Fourteenth Amendment.[5] With respect to hierarchical churches, *Watson* held:

> "[T]he rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.,* at 727.

In language having "a clear constitutional ring," *Presbyterian Church* v. *Hull Church, supra,* at 446, *Watson* reasoned:

"The law knows no heresy, and is committed to the

[5] Since *Watson* predated *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), it was based on general federal law rather than the state law of the forum in which it was brought.

> support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.*" 13 Wall., at 728–729 (emphasis supplied).

Gonzalez v. *Archbishop*, 280 U. S. 1 (1929), applied this principle in a case involving dispute over entitlement to certain income under a will that turned upon an ecclesiastical determination as to whether an individual would be appointed to a chaplaincy in the Roman Catholic Church. The Court, speaking through Mr. Justice Brandeis, observed:

> "Because the appointment [to the chaplaincy] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church

> tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.*, at 16.

Thus, although *Watson* had left civil courts no role to play in reviewing ecclesiastical decisions during the course of resolving church property disputes, *Gonzalez* first adverted to the possibility of "marginal civil court review," *Presbyterian Church* v. *Hull Church, supra,* at 447, in cases challenging decisions of ecclesiastical tribunals as products of "fraud, collusion, or arbitrariness." However, since there was "not even a suggestion that [the Archbishop] exercised his authority [in making the chaplaincy decision] arbitrarily," 280 U. S., at 18, the suggested "fraud, collusion, or arbitrariness" exception to the *Watson* rule was dictum only. And although references to the suggested exception appear in opinions in cases decided since the *Watson* rule has been held to be mandated by the First Amendment,[6] no decision of this Court has given concrete content to or applied the "exception." However, it was the predicate for the Illinois Supreme Court's decision in this case, and we therefore turn to the question whether reliance upon it in the circumstances of this case was consistent with the prohibition of the First and Fourteenth Amendments against rejection of the decisions of the Mother Church upon the religious disputes in issue.

The conclusion of the Illinois Supreme Court that the decisions of the Mother Church were "arbitrary" was grounded upon an inquiry that persuaded the Illinois Su-

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[6] See *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, 115–116, and n. 23 (1952); *Presbyterian Church* v. *Hull Church,* 393 U. S. 440, 447, 450–451, and n. 7 (1969); *Md. & Va. Churches* v. *Sharpsburg Church,* 396 U. S. 367, 369 n. 3 (1970) (BRENNAN, J., concurring).

preme Court that the Mother Church had not followed its own laws and procedures in arriving at those decisions. We have concluded that whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes,[7] no "arbitrariness" exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them. *Watson* itself requires our conclusion in its rejection of the analogous argument that ecclesiastical decisions of the highest church judicatories need only be accepted if the subject matter of the dispute is within their "jurisdiction."

> "But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts

[7] No issue of "fraud" or "collusion" is involved in this case.

> exercise no jurisdiction,—*a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them*,—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that *if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws*, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, *and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.*" 13 Wall., at 733–734. (Emphasis supplied.)

Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith [8] whether or not rational or measurable by

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[8] Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the "law" that governs ecclesiastical disputes, as *Watson* cogently remarked, 13 Wall., at 729:

"Nor do we see that justice would be likely to be promoted by

objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

The constitutional evils that attend upon any "arbitrariness" exception in the sense applied by the Illinois Supreme Court to justify civil court review of ecclesiastical decisions of final church tribunals are manifest in the instant case. The Supreme Court of Illinois recognized that all parties agree that the Serbian Orthodox Church is a hierarchical church, and that the sole power to appoint and remove Bishops of the Church resides in its highest ranking organs, the Holy Assembly and the Holy Synod.[9] Indeed, final authority with respect to the

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submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."

[9] "Plaintiffs argue and defendant Bishop Dionisije does not dispute that the Serbian Orthodox Church is a hierarchical and episcopal church. Moreover, the parties agree that in cases involving hierarchical churches the decisions of the proper church tribunals on questions of discipline, faith or ecclesiastical rule, though affecting civil rights, are accepted as conclusive in disputes before the civil courts. . . . All parties maintain that the sole limitation on this rule, when civil courts may entertain the 'narrowest kind of review,' occurs when the decision of the church tribunal is claimed

promulgation and interpretation of *all* matters of church discipline and internal organization rests with the Holy Assembly, and even the written constitution of the Mother Church expressly provides:

> "The Holy Assembly of Bishops, as the highest hierarchical body, is legislative authority in the matters of faith, officiation, church order (discipline) and internal organization of the Church, as well as the highest church juridical authority within its jurisdiction (Article 69 sec. 28)." Art. 57.
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> "All the decisions of the Holy Assembly of Bish-

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to have resulted from fraud, collusion or arbitrariness." 60 Ill. 2d 477, 501, 328 N. E. 2d 268, 280 (1975).

Respondents conceded as much at oral argument. Tr. of Oral Arg. 24–25, 39–40. The hierarchical nature of the relationship between the American-Canadian Diocese and the Mother Church is confirmed by the fact that respondent corporations were organized under the provisions of the Illinois Religious Corporations Act governing the incorporation of religious societies that are subordinate parts of larger church organizations. Similarly, the Diocese's subordinate nature was manifested in resolutions of the Diocese which Dionisije supported, and by Dionisije's submission of corporate bylaws, proposed constitutional changes, and final judgments of the Diocesan Ecclesiastical Court to the Holy Synod or Holy Assembly for approval. Moreover, when Dionisije was originally elevated to Bishop, he signed an Episcopal-Hierarchical Oath by which he swore that he would "always be obedient to the Most Holy Assembly" and:

"Should I transgress against whatever I promised here, or should I be disobedient to the Divine Ordinances and Order of the Eastern Orthodox Church, or to the Most Holy Assembly (of Bishops) I, personally, will become a schismatic and should I make the Diocese entrusted to me in any manner to become disobedient to the Most Holy Assembly (of Bishops), may I, in that case, be defrocked of my rank and divested of the (episcopal) authority without any excuse or gainsay, and (may I) become an alien to the heavenly gift which is being given unto me by the Holy Spirit through the Consecration of the Laying of Hands." App. 1088.

Finally, the hierarchical relationship was confirmed by provisions in the constitutions of both the Diocese and the Mother Church.

ops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church, are valid and final." Art. 64.

"The Holy Assembly of Bishops, whose purpose is noted in Article 57 of this Constitution:

. . . . .

"9) interprets canonical-ecclesiastical rules, those which are general and obligatory, and particular ones, and publishes their collections;

. . . . .

"12) prescribes the ecclesiastical-judicial procedure for all Ecclesiastical Courts;

. . . . .

"26) settles disputes of jurisdiction between hierarchical and church-self governing organs;

"27) ADJUDGES:

"A) In first and in final instances:

"a) disagreements between bishops and the Holy Synod, and between the bishops and the Patriarch;

"b) canonical offenses of the Patriarch;

"B) In the second and final instance:

"All matters which the Holy Synod of Bishops judged in the first instance." Art. 69.

Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern; the bishop of a church is clearly one of the central figures in such a hierarchy and the embodiment of the church within his Diocese, and the Mother Church constitution states that "[h]e is, according to the church canonical regulations, chief representative and guiding leader of all church spiritual life and church order in the diocese." Art. 13.

Yet having recognized that the Serbian Orthodox Church is hierarchical and that the decisions to suspend and

defrock respondent Dionisije were made by the religious bodies in whose sole discretion the authority to make those ecclesiastical decisions was vested, the Supreme Court of Illinois nevertheless invalidated the decision to defrock Dionisije on the ground that it was "arbitrary" because a "detailed review of the evidence discloses that the proceedings resulting in Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of the Serbian Orthodox Church." 60 Ill. 2d, at 503, 328 N. E. 2d, at 281. Not only was this "detailed review" impermissible under the First and Fourteenth Amendments, but in reaching this conclusion, the court evaluated conflicting testimony concerning internal church procedures and rejected the interpretations of relevant procedural provisions by the Mother Church's highest tribunals. *Id.*, at 492–500, 328 N. E. 2d, at 276–280. The court also failed to take cognizance of the fact that the church judicatories were also guided by other sources of law, such as canon law, which are admittedly not always consistent, and it rejected the testimony of petitioners' five expert witnesses [10] that church procedures were properly followed, denigrating the testimony of one witness as "contradictory" and discounting that of another on the ground that it was "premised upon an assumption which did not consider the penal code," even though there was some question whether that code even applied to discipline of Bishops.[11] The court

[10] Three of these witnesses, including the author of the Church penal code, were members of the Holy Assembly of Bishops, one was the Secretary of the Holy Synod, and one was a recognized expert in the field of ecclesiastical law.

[11] Indeed Dionisije, who does not dispute the power of the Holy Assembly to discipline him for the substantive charges in his indictment, nevertheless inconsistently insists that the Holy Assembly must be bound by procedures which were not extant when he exe-

accepted, on the other hand, the testimony of respondents' sole expert witness that the Church's procedures had been contravened in various specifics. We need not, and under the First Amendment cannot, demonstrate the propriety or impropriety of each of Dionisije's procedural claims, but we can note that the state court even rejected petitioners' contention that Dionisije's failure to participate in the proceedings undermined all procedural contentions because Arts. 66 and 70 of the penal code specify that if a person charged with a violation fails to participate or answer the indictment, the allegations are admitted and due process will be concluded without his participation; the court merely asserted that "application of this provision . . . must be viewed from the perspective that Bishop Dionisije refused to participate because he maintained that the proceedings against him were in violation of the constitution and the penal code of the Serbian Orthodox Church." 60 Ill. 2d, at 502, 328 N. E. 2d, at 281. The court found no support in any church dogma for this judicial rewriting of church law, and compounded further the error of this intrusion into a religious thicket by declaring that although Dionisije had, even under the court's analysis, been properly suspended and replaced by Firmilian as temporary administrator, he had to be reinstated as Bishop because church law mandated a trial on ecclesiastical charges within one year of the indictment. Yet the only reason more time than that had expired was due to Dionisije's decision to resort to the civil courts for redress without attempting to vindicate himself by pursuing available

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cuted his Episcopal-Hierarchical Oath, see n. 9, *supra,* and which were promulgated within a year of the beginning of this controversy, although at the same time he agrees that the Holy Assembly could formalize and promulgate any procedures it desired for the conduct of disciplinary action.

remedies within the church. Indeed, the Illinois Supreme Court overlooked the clear substantive canonical violations for which the Church disciplined Dionisije, violations based on Dionisije's conceded open defiance and rebellion against the church hierarchy immediately after the Holy Assembly's decision to suspend him (a decision which even the Illinois courts deemed to be proper) and Dionisije's decision to litigate the Mother Church's authority in the civil courts rather than participate in the disciplinary proceedings before the Holy Synod and the Holy Assembly. Instead, the Illinois Supreme Court would sanction this circumvention of the tribunals set up to resolve internal church disputes and has ordered the Mother Church to reinstate as Bishop one who espoused views regarded by the church hierarchy to be schismatic and which the proper church tribunals have already determined merit severe sanctions. In short, under the guise of "minimal" review under the umbrella of "arbitrariness," the Illinois Supreme Court has unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church. And although the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations, the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation, having been reached by the final church judicatory in which authority to make the decision resides.

III

Similar considerations inform our resolution of the second question we must address—the constitutionality of the Supreme Court of Illinois' holding that the Mother Church's reorganization of the American-Canadian Dio-

cese into three Dioceses was invalid because it was " 'in clear and palpable excess of its own jurisdiction.' " Essentially, the court premised this determination on its view that the early history of the Diocese "manifested a clear intention to retain independence and autonomy in its administrative affairs while at the same time becoming ecclesiastically and judicially an organic part of the Serbian Orthodox Church," and its interpretation of the constitution of the American-Canadian Diocese as confirming this intention. It also interpreted the constitution of the Serbian Orthodox Church, which was adopted after the Diocesan constitution, in a manner consistent with this conclusion. 60 Ill. 2d, at 506–507, 328 N. E. 2d, at 283–284.

This conclusion was not, however, explicitly based on the "fraud, collusion, or arbitrariness" exception. Rather, the Illinois Supreme Court relied on purported "neutral principles" for resolving property disputes which would "not in any way entangle this court in the determination of theological or doctrinal matters." *Id.*, at 505, 328 N. E. 2d, at 282. Nevertheless the Supreme Court of Illinois substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments forbid.

We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs; Arts. 57 and 64 of the Mother Church constitution commit such questions of church polity to the final province of the Holy Assembly. *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, 116 (1952), stated that religious freedom encompasses the

"power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." The subordination of the Diocese to the Mother Church in such matters, which are not only "administrative" but also "hierarchical," [12] was provided, and the power of the Holy Assembly to reorganize the Diocese is expressed in the Mother Church constitution.[13] Contrary to the interpretation of the Illinois court, the church judicatories interpreted the provisions of the Diocesan constitution not to interdict or govern this action, but only to relate to the day-to-day administration of Diocesan property.[14]

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[12] See Art. 12, quoted *supra*, at 699. Various provisions of the Diocesan constitution reaffirm the subordinate status of the Diocese. *E. g.*, Arts. 1, 2, 10, 12, 23, 53. Moreover, the Mother Church exerts almost complete authority over most Diocesan matters through the Diocesan Bishop, and there is no question that the Diocese has no voice whatever in the appointment of the Bishop.

[13] See Art. 16, quoted *supra*, at 699–700. In rejecting the Holy Assembly's interpretation of this provision, the Illinois court treated the creation and reorganization of dioceses as purely administrative, without recognizing the central role of a diocese in the hierarchical structure of the Church. In particular, the Illinois court noted that Art. 14 of the Mother Church constitution states "[t]hese are the Dioceses in the Serbian Orthodox Church," and lists only the Dioceses within Yugoslavia. In Art. 15, on the other hand, were listed Dioceses "under the jurisdiction of the Serbian Orthodox Church in spiritual and hierarchical aspect," including the American-Canadian Diocese. Although nothing in the constitution restricted the Mother Church's power with respect to reorganizing the Dioceses listed in Art. 15, the Illinois courts simply asserted that Art. 16 was only intended to apply to Dioceses named in Art. 14. Yet even the Diocese itself recognized the Holy Assembly's powers when it sought approval for institution of the "Metropolia" system.

[14] The Illinois court, in refusing to follow the Holy Assembly's interpretation of these religious documents, relied primarily on Art. 3 of the Diocesan constitution, quoted *supra*, at 701. However, the Holy Assembly's construction of that provision limits its application

The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity. See *Md. & Va. Churches* v. *Sharpsburg Church,* 396 U. S., at 368–370 (BRENNAN, J., concurring).[15]

The control of Diocesan property may be little affected by the changes; respondents' allegation that the reorganization was a fraudulent subterfuge to divert Diocesan property from its intended beneficiaries has been rejected by the Illinois courts. Formal title to the property remains in respondent property-holding corporations, to be held in trust for all members of the new Dioceses. The boundaries of the reorganized Dioceses generally conform to the episcopal districts which the American-Canadian Diocese had already employed for its internal government, and the appointed administrators of the new Dioceses were the same individuals nominated by Dionisije as assistant bishops to govern similar divisions under him. Indeed, even the Illinois courts' rationale that the reorganization would effectuate an abrogation of the Diocesan constitution has no support in the record, which establishes rather that the details of the reorganization and any decisions pertaining to a distribution of

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to administration of property within the Diocese, and as not restricting alterations in the Diocese itself.

[15] No claim is made that the "formal title" doctrine by which church property disputes may be decided in civil courts is to be applied in this case. See *Md. & Va. Churches* v. *Sharpsburg Church,* 396 U. S., at 370 (BRENNAN, J., concurring). Indeed, the Mother Church decisions defrocking Dionisije and reorganizing the Diocese in no way change formal title to all Diocesan property, which continues to be in the respondent property-holding corporations in trust for all members of the reorganized Dioceses; only the identity of the trustees is altered by the Mother Church's ecclesiastical determinations.

the property among the three Dioceses were expressly left for the Diocesan National Assembly to determine. In response to inquiries from the Diocese, the Holy Assembly assured Bishop Firmilian:

> "1. That all the rights of the former American-Canadian Diocese, as they relate to the autonomy in the administrative sense, remain unchanged. The only exception is the forming of three dioceses and
>
> "2. That the Constitution of the former American-Canadian Diocese remains the same and that the Dioceses in America and Canada will not, in an administrative sense (the management (*or direction*) of the properties) be managed (*or directed*) in the same manner as those in Yugoslavia." App. 1446.

As a practical matter the effect of the reorganization is a tripling of the Diocesan representational strength in the Holy Assembly and a decentralization of hierarchical authority to permit closer attention to the needs of individual congregations within each of the new Dioceses, a result which Dionisije and Diocesan representatives had already concluded was necessary. Whether corporate bylaws or other documents governing the individual property-holding corporations may affect any desired disposition of the Diocesan property is a question not before us.

IV

In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over

the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Reversed.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE WHITE, concurring.

Major predicates for the Court's opinion are that the Serbian Orthodox Church is a hierarchical church and the American-Canadian Diocese, involved here, is part of that Church. These basic issues are for the courts' ultimate decision, and the fact that church authorities may render their opinions on them does not foreclose the courts from coming to their independent judgment. I do not understand the Court's opinion to suggest otherwise and join the views expressed therein.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEVENS joins, dissenting.

The Court's opinion, while long on the ecclesiastical history of the Serbian Orthodox Church, is somewhat short on the procedural history of this case. A casual reader of some of the passages in the Court's opinion could easily gain the impression that the State of Illinois had commenced a proceeding designed to brand Bishop Dionisije as a heretic, with appropriate pains and penalties. But the state trial judge in the Circuit Court of Lake County was not the Bishop of Beauvais, trying Joan of Arc for heresy; the jurisdiction of his court was invoked by petitioners themselves, who sought an injunction establishing their control over property of the American-Canadian Diocese of the church located in Lake County.

The jurisdiction of that court having been invoked

for such a purpose by both petitioners and respondents, contesting claimants to Diocesan authority, it was entitled to ask if the real Bishop of the American-Canadian Diocese would please stand up. The protracted proceedings in the Illinois courts were devoted to the ascertainment of who that individual was, a question which the Illinois courts sought to answer by application of the canon law of the church, just as they would have attempted to decide a similar dispute among the members of any other voluntary association. The Illinois courts did not in the remotest sense inject their doctrinal preference into the dispute. They were forced to decide between two competing sets of claimants to church office in order that they might resolve a dispute over real property located within the State. Each of the claimants had requested them to decide the issue. Unless the First Amendment requires control of disputed church property to be awarded solely on the basis of ecclesiastical paper title, I can find no constitutional infirmity in the judgment of the Supreme Court of Illinois.

Unless civil courts are to be wholly divested of authority to resolve conflicting claims to real property owned by a hierarchical church, and such claims are to be resolved by brute force, civil courts must of necessity make some factual inquiry even under the rules the Court purports to apply in this case. We are told that "a civil court must accept the ecclesiastical decisions of church tribunals as it finds them," *ante,* at 713. But even this rule requires that proof be made as to what these decisions are, and if proofs on that issue conflict the civil court will inevitably have to choose one over the other. In so choosing, if the choice is to be a rational one, reasons must be adduced as to why one proffered decision is to prevail over another. Such reasons will

obviously be based on the canon law by which the disputants have agreed to bind themselves, but they must also represent a preference for one view of that law over another.

If civil courts, consistently with the First Amendment, may do that much, the question arises why they may not do what the Illinois courts did here regarding the defrockment of Bishop Dionisije, and conclude, on the basis of testimony from experts on the canon law at issue, that the decision of the religious tribunal involved was rendered in violation of its own stated rules of procedure. Suppose the Holy Assembly in this case had a membership of 100; its rules provided that a bishop could be defrocked by a majority vote of any session at which a quorum was present, and also provided that a quorum was not to be less than 40. Would a decision of the Holy Assembly attended by 30 members, 16 of whom voted to defrock Bishop Dionisije, be binding on civil courts in a dispute such as this? The hypothetical example is a clearer case than the one involved here, but the principle is the same. If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness.

The cases upon which the Court relies are not a uniform line of authorities leading inexorably to reversal of the Illinois judgment. On the contrary, they embody two distinct doctrines which have quite separate origins. The first is a common-law doctrine regarding the appropriate roles for civil courts called upon to adjudicate church property disputes—a doctrine which found general application in federal courts prior to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), but which has never had any application to our review of a state-court

decision. The other is derived from the First Amendment to the Federal Constitution, and is of course applicable to this case; it, however, lends no more support to the Court's decision than does the common-law doctrine.

The first decision of this Court regarding the role of civil courts in adjudicating church property disputes was *Watson* v. *Jones*, 13 Wall. 679 (1872). There the Court canvassed the American authorities and concluded that where people had chosen to organize themselves into voluntary religious associations, and had agreed to be bound by the decisions of the hierarchy created to govern such associations, the civil courts could not be availed of to hear appeals from otherwise final decisions of such hierarchical authorities. The bases from which this principle was derived clearly had no constitutional dimension; there was not the slightest suggestion that the First Amendment or any other provision of the Constitution was relevant to the decision in that case. Instead the Court was merely recognizing and applying general rules as to the limited role which civil courts must have in settling private intraorganizational disputes. While those rules, and the reasons behind them, may seem especially relevant to intrachurch disputes, adherence or nonadherence to such principles was certainly not thought to present any First Amendment issues. For as the Court in *Watson* observed:

> "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints." *Id.*, at 714.

The Court's equation of religious bodies with other private voluntary associations makes it clear that the prin-

ciples discussed in that case were not dependent upon those embodied in the First Amendment.

Less than a year later *Watson*'s observations about the roles of civil courts were followed in *Bouldin* v. *Alexander*, 15 Wall. 131 (1872), where the Court held that the appointed trustees of the property of a congregational church

> "cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules." *Id.*, at 140.

Again, there was nothing to suggest that this was based upon anything but commonsense rules for deciding an intraorganizational dispute: in an organization which has provided for majority rule through certain procedures, a minority's attempt to usurp that rule and those procedures need be given no effect by civil courts.

In *Gonzalez* v. *Archbishop*, 280 U. S. 1 (1929), the Court again recognized the principles underlying *Watson* in upholding a decision of the Supreme Court of the Philippine Islands that the petitioner was not entitled to the chaplaincy which he claimed because the decision as to whether he possessed the necessary qualifications for that post was one committed to the appropriate church authorities. In dicta which the Court today conveniently truncates, Mr. Justice Brandeis observed:

> "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies estab-*

> *lished by clubs and civil associations." Id.*, at 16–17 (emphasis supplied; footnotes omitted).

Gonzalez clearly has no more relevance to the meaning of the First Amendment than do its two predecessors.

The year 1952 was the first occasion on which this Court examined what limits the First and Fourteenth Amendments might place upon the ability of the States to entertain and resolve disputes over church property. In *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94 (1952), the Court reversed a decision of the New York Court of Appeals which had upheld a statute awarding control of the New York property of the Russian Orthodox Church to an American group seeking to terminate its relationships with the hierarchical Mother Church in Russia. The New York Legislature had concluded that the Communist government of Russia was actually in control of the Mother Church and that " 'the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy,' " *id.*, at 107 n. 10, quoting from 302 N. Y. 1, 32–33, 96 N. E. 2d 56, 73–74 (1950), and the New York Court of Appeals sustained the statute against the constitutional attack. This Court, however, held the statute was a violation of the Free Exercise Clause, noting:

> "By fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." 344 U. S., at 119.

On remand from the decision in *Kedroff*, the New York Court of Appeals again held that the American

group was entitled to the church property at issue. This time relying upon the common law of the State, the Court of Appeals ruled that the Patriarch of Moscow was so dominated by the secular government of Russia that his appointee could not validly occupy the Church's property. On appeal, this Court reversed summarily, *Kreshik* v. *St. Nicholas Cathedral,* 363 U. S. 190 (1960), noting in its *per curiam* opinion that

> "the decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff.*" *Id.,* at 191.

Nine years later, in *Presbyterian Church* v. *Hull Church,* 393 U. S. 440 (1969), the Court held that Georgia's common law, which implied a trust upon local church property for the benefit of the general church only on the condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches, was inconsistent with the First and Fourteenth Amendments and therefore could not be utilized to resolve church property disputes. The Georgia law was held impermissible because

> "[u]nder [the Georgia] approach, property rights do not turn on a church decision as to church doctrine. The standard of departure-from-doctrine, though it calls for resolution of ecclesiastical questions, is a creation of state, not church, law." *Id.,* at 451.

Finally, in *Md. & Va. Churches* v. *Sharpsburg Church,* 396 U. S. 367 (1970), the Court considered an appeal from a judgment of the Court of Appeals of Maryland upholding the dismissal of two actions brought by the Eldership seeking to prevent two of its local churches from withdrawing from that general religious association. The Eldership had also claimed the rights to select the

clergy and to control the property of the two local churches, but the Maryland courts, relying "upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, *and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property*," *ibid.* (emphasis supplied; footnote omitted), concluded that the Eldership had no right to invoke the State's authority to compel their local churches to remain within the fold or to succeed to control of their property. This Court dismissed the Eldership's contention that this judgment violated the First Amendment for want of a substantial federal question.

Despite the Court's failure to do so, it does not seem very difficult to derive the operative constitutional principle from this line of decisions. As should be clear from even this cursory study, *Watson*, *Bouldin*, and *Gonzalez* have no direct relevance* to the question before us today:

*I am far from persuaded, moreover, that these decisions would require the result reached today even if we were reviewing a federal decision rather than that of a state court. As demonstrated in the text, *supra*, these cases were applications of the general principle that persons who have contractually bound themselves to adhere to the decisions of the ruling hierarchy in a private association may not obtain relief from those decisions in a civil court. Here the underlying question addressed by the Illinois courts is the one assumed in *Watson et al.*: whether the members of the American-Canadian Diocese *had* bound themselves to abide by the decisions of the Mother Church in the matters at issue here. The Illinois courts concluded that in regard to some of these matters they had agreed to be bound only if certain procedures were followed and that as to others there had been no agreement to submit to the authority of the Belgrade Patriarchate at all. If these conclusions are correct, and there is little to indicate they

whether the First Amendment, as made applicable to the States by the Fourteenth, prohibits Illinois from permitting its civil courts to settle religious property disputes in the manner presented to us on this record. I think it equally clear that the only cases which *are* relevant to that question—*Kedroff, Kreshik, Hull,* and *Md. & Va. Churches*—require that this question be answered in the negative. The rule of those cases, one which seems fairly implicit in the history of our First Amendment, is that the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect. That is what New York attempted to do in *Kedroff* and *Kreshik,* albeit perhaps for nonreligious reasons, and the Court refused to permit it. In *Hull,* the State transgressed the line drawn by the First Amendment when it applied a state-created rule of law based upon "departure from doctrine" to prevent the national hierarchy of the Presbyterian Church in the United States from seeking to reclaim possession and use of two local churches. When the Georgia courts themselves required an examination into whether there had been a departure from the doctrine of the church in order to apply this state-created rule, they went beyond mere application of neutral principles of law to such a dispute.

There is nothing in this record to indicate that the Illinois courts have been instruments of any such impermissible intrusion by the State on one side or the other of a religious dispute. There is nothing in the Supreme Court of Illinois' opinion indicating that it placed its thumb on the scale in favor of the respondents. Instead that opinion appears to be precisely what it pur-

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are not, then the "*Watson* rule" which the Court brandishes so freely today properly would have no application to these facts even if this case had arisen in federal court.

ports to be: an application of neutral principles of law consistent with the decisions of this Court. Indeed, petitioners make absolutely no claim to the contrary. They agree that the Illinois courts *should* have decided the issues which *they* presented; but they contend that in doing so those courts should have deferred entirely to the representations of the announced representatives of the Mother Church. Such blind deference, however, is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.

In any event the Court's decision in *Md. & Va. Churches* demonstrates that petitioners' position in this regard is untenable. And as I read that decision, it seems to me to compel affirmance of at least that portion of the Illinois court's decision which denied petitioners' request for the aid of the civil courts in enforcing its desire to divide the American-Canadian Diocese. See *ante,* at 720–724 (Part III). I see no distinction between the Illinois courts' refusal to place their weight behind the representatives of the Serbian Mother Church who sought to prevent portions of their American congregation from splitting off from that body and the Maryland courts' refusal to do the same thing for the Eldership of the Church of God. The Court today expressly eschews any explanation for its failure to follow *Md. & Va. Churches,* see *ante,* at 721, contenting itself with this conclusory statement:

> "The constitutional provisions of the American-Canadian Diocese were not so express that the civil

> courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity." *Ante,* at 723.

But comparison of the relevant discussions by the state tribunals regarding their consideration of church documents makes this claimed distinction seem quite specious. Compare *Md. & Va. Churches* v. *Sharpsburg Church,* 254 Md. 162, 170, 254 A. 2d 162, 168 (1969), with *Serbian Orthodox Diocese* v. *Ocokoljich,* 72 Ill. App. 2d 444, 458–462, 219 N. E. 2d 343, 350–353 (1966).

In conclusion, while there may be a number of good arguments that civil courts of a State should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible, they obviously cannot avoid all such adjudications. And while common-law principles like those discussed in *Watson, Bouldin,* and *Gonzalez* may offer some sound principles for those occasions when such adjudications are required, they are certainly not rules to which state courts are required to adhere by virtue of the Fourteenth Amendment. The principles which that Amendment, through its incorporation of the First, *does* enjoin upon the state courts—that they remain neutral on matters of religious doctrine—have not been transgressed by the Supreme Court of Illinois.

ROEMER ET AL. *v.* BOARD OF PUBLIC WORKS OF MARYLAND ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 74–730. Argued February 23, 1976—Decided June 21, 1976

In 1971, a Maryland statute was enacted that authorizes the payment of state funds to any private institution of higher learning within the State that meets certain minimum criteria, and refrains from awarding "only seminarian or theological degrees." The aid is in the form of an annual fiscal year subsidy to qualifying colleges and universities, based upon the number of students, excluding those in seminarian or theological academic programs. The grants are noncategorical but may not, under a provision added in 1972, "be utilized by the institutions for sectarian purposes." The assistance program is primarily administered by the Maryland Council for Higher Education, which, in order to insure compliance with statutory restrictions, (1) determines whether an applicant institution is eligible at all, or is one "awarding primarily theological or seminary degrees," and (2) requires that eligible institutions not use funds for sectarian purposes. At the end of the fiscal year the recipient institution must make a report and separately identify the aided nonsectarian expenditures, subject to the Council's verification if necessary. This suit was brought by appellants, four individual Maryland citizens and taxpayers, who challenged the statutory scheme as violative of the Establishment Clause of the First Amendment and claimed that appellees, four colleges affiliated with the Roman Catholic Church, were constitutionally ineligible for the state aid. The District Court, applying the three-part requirement of *Lemon* v. *Kurtzman*, 403 U. S. 602 (*viz.*, state aid such as this must have a secular purpose, a primary effect other than the advancement of religion, and no tendency to entangle the State excessively in church affairs), upheld the statute and denied appellants relief. The court found that, despite their formal affiliation with the Roman Catholic Church, appellee colleges are not "pervasively sectarian." The court also found that aid was in fact extended only to "the secular side," having taken cognizance of the statutory prohibition against sectarian use, and the Council's admin-

istrative enforcement of that prohibition. The court also found that "there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education," and that "excessive entanglement" does not necessarily result from the fact that the subsidy is on an annual basis. Though occasional audits are possible to verify the sectarian purposes of expenditures, the District Court found that they would be "quick and non-judgmental." *Held:* The judgment is affirmed. Pp. 745–767; 767–770.

387 F. Supp. 1282, affirmed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE and MR. JUSTICE POWELL, concluded that the Maryland Act does not, under the standards set by *Lemon* v. *Kurtzman, supra,* at 612–613, violate the Establishment Clause. Pp. 745–767.

(a) The first part of *Lemon*'s three-pronged test is not at issue here, since appellants do not challenge the District Court's finding that the Maryland aid program is the secular one of supporting private higher education generally, as an economic alternative to a wholly public system. P. 754.

(b) The aid provided under the Maryland statute does not have a primary effect of advancing religion under the refinement of the test added by *Hunt* v. *McNair,* 413 U. S. 734, 743, that aid has such an effect "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Here the District Court's finding that appellee colleges are not "pervasively sectarian" was supported by a number of subsidiary findings concerning the role of religion on the college campuses. Such findings are not clearly erroneous, and the general picture that the District Court has painted of the appellee institutions is similar in almost all respects to that of the church-affiliated colleges considered in *Tilton* v. *Richardson,* 403 U. S. 672, and *Hunt* v. *McNair, supra.* Pp. 755–759.

(c) The District Court also correctly concluded that the other aspect of the "primary effect" test was satisfied, *i. e.,* that aid in fact is extended only to "the secular side." *Hunt, supra,* requires only that state funds not be used to support "specifically religious activity," and it is clear that the funding program here meets this requirement. The statute forbids use of funds for "sec-

tarian purposes," and the prohibition appears to be at least as broad as the constitutional prohibition announced in *Hunt*. Pp. 759–761.

(d) When account is taken of the relevant factors considered by the District Court, its conclusion that the Maryland scheme does not foster an excessive entanglement with religion must be upheld. The colleges, as the court found, perform "essentially secular educational functions." The fact that the subsidy is an annual one does not necessarily implicate "excessive entanglement," the aid program here more closely resembling that found constitutionally acceptable in *Tilton* v. *Richardson*, *supra*, than that found unacceptable in *Lemon*, *supra*. Though occasional audits are possible here, they and other contacts between the Council and the colleges are not likely to be more entangling than inspections and audits involved in the course of normal college accreditations. And here, unlike the situation in *Lemon*, the State can identify and subsidize separate secular school functions without on-site inspections. Finally, with respect to political divisiveness, the District Court correctly found that the Maryland program did not create a substantial danger of political entanglement, the court having properly stressed the facts that the aided institutions are colleges, not elementary or secondary schools; that aid is extended to colleges generally, more than two-thirds of which have no religious affiliation; and that the four colleges are substantially autonomous. Pp. 761–767.

MR. JUSTICE WHITE, joined by MR. JUSTICE REHNQUIST, concluded that there is no violation of the Establishment Clause where, as in this case, there is a secular legislative purpose and the primary effect of the legislation is neither to advance nor inhibit religion. There is no reason to pursue the constitutional inquiry further. See *Lemon* v. *Kurtzman*, *supra*, at 661 (opinion of WHITE, J.); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 813 (WHITE, J., dissenting). Pp. 767–770.

BLACKMUN, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and POWELL, J., joined. WHITE, J., filed an opinion concurring in the judgment, in which REHNQUIST, J., joined, *post*, p. 767. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 770. STEWART, J., *post*, p. 773, and STEVENS, J., *post*, p. 775, filed dissenting opinions.

Lawrence S. Greenwald argued the cause for appellants. With him on the brief was *Melvin L. Wulf.*

George A. Nilson, Assistant Attorney General of Maryland, and *Paul R. Connolly* argued the cause for appellees. With *Mr. Nilson* on the brief for appellees Board of Public Works of Maryland et al. were *Francis B. Burch,* Attorney General, and *Henry R. Lord,* Deputy Attorney General. With *Mr. Connolly* on the brief for appellees Loyola College et al. were *Charles H. Wilson* and *John C. Evelius. George W. Constable* filed a brief for appellee College of Notre Dame of Maryland, Inc. *George T. Tyler* and *Robert V. Barton, Jr.,* filed a brief for appellee St. Joseph College at Emmitsburg, Maryland, Inc.

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE POWELL joined.

We are asked once again to police the constitutional boundary between church and state. Maryland, this time, is the alleged trespasser. It has enacted a statute which, as amended, provides for annual noncategorical grants to private colleges, among them religiously affiliated institutions, subject only to the restrictions that the funds not be used for "sectarian purposes." A three-judge District Court, by a divided vote, refused to enjoin the operation of the statute, 387 F. Supp. 1282 (Md. 1974), and a direct appeal has been taken to this Court pursuant to 28 U. S. C. § 1253.

**Leo Pfeffer* filed a brief for the National Coalition for Public Education and Religious Liberty as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork, Assistant Attorney General Lee,* and *Thomas G. Wilson* for the United States, and by *Charles M. Whelan* for the Association of American Colleges et al.

I

The challenged grant program was instituted by Laws of 1971, c. 626, and is now embodied in Md. Ann. Code, Art. 77A, §§ 65–69 (1975). It provides funding for "any private institution of higher learning within the State of Maryland," provided the institution is accredited by the State Department of Education, was established in Maryland prior to July 1, 1970, maintains one or more "associate of arts or baccalaureate degree" programs, and refrains from awarding "only seminarian or theological degrees." §§ 65–66.[1] The aid is in the form of an annual fiscal year subsidy to qualifying colleges and universities. The formula by which each institution's entitlement is computed has been changed several times and is not independently at issue here. It now provides for a qualifying institution to receive, for each full-time student (excluding students enrolled in seminarian or theological academic programs), an amount equal to 15% of the State's per-full-time-pupil appropriation for a student in the state college system. § 67. As first enacted, the grants were completely unrestricted. They remain noncategorical in nature, and a recipient institution may put them to whatever use it prefers, with but one exception. In 1972, following this Court's decisions in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) (*Lemon I*), and *Tilton* v. *Richardson*, 403 U. S. 672 (1971), § 68A was added to the statute by Laws of 1972, c. 534. It provides:

"None of the moneys payable under this subtitle

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[1] A 1974 amendment to the statute, Laws of 1974, c. 585, further requires that an aided institution

"shall submit all new programs and major alterations of programs to the Maryland Council for Higher Education for its review and recommendation regarding their initiation." Md. Ann. Code, Art. 77A, § 66 (e) (1975).

shall be utilized by the institutions for sectarian purposes."

The administration of the grant program is entrusted to the State's Board of Public Works "assisted by the Maryland Council for Higher Education." These bodies are to adopt "criteria and procedures . . . for the implementation and administration of the aid program." They are specifically authorized to adopt "criteria and procedures" governing the method of application for grants and of their disbursement, the verification of degrees conferred, and the "submission of reports or data concerning the utilization of these moneys by [the aided] institutions." § 68.[2] Primary responsibility for the program rests with the Council for Higher Education, an appointed commission which antedates the aid program, which has numerous other responsibilities in the educational field, and which has derived from these a "considerable expertise as to the character and functions of the various private colleges and universities in the State." 387 F. Supp., at 1285.

The Council performs what the District Court described as a "two-step screening process" to insure compliance with the statutory restrictions on the grants. First, it determines whether an institution applying for aid is eligible at all, or is one "awarding primarily theo-

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[2] Section 68 provides in full:

"The Board of Public Works assisted by the Maryland Council for Higher Education shall adopt criteria and procedures, not inconsistent with this subtitle, for the implementation and administration of the aid program provided for by this subtitle, including but not limited to criteria and procedures for the submission of applications for aid under this subtitle, for the verification of degrees conferred by the applicant private institutions of higher education, for the submission of reports or data concerning the utilization of these moneys by such institutions, and for the method and times during the fiscal year for paying the aid provided for by this subtitle."

logical or seminary degrees." [3] Several applicants have been disqualified at this stage of the process. *Id.*, at 1289, 1296. Second, the Council requires that those institutions that are eligible for funds not put them to any sectarian use. An application must be accompanied by an affidavit of the institution's chief executive officer stating that the funds will not be used for sectarian purposes, and by a description of the specific nonsectarian uses that are planned.[4] These may be changed only after written notice to the Council. By the end of the fiscal year the institution must file a "Utilization of Funds Report" describing and itemizing the use of the funds. The chief executive officer must certify the report and also file his own "Post-expenditure Affidavit," stating that the funds have not been put to sectarian uses. The recipient institution is further required to segregate state funds in a "special revenue account" and to identify aided nonsectarian expenditures separately in its budget. It must retain "sufficient documentation of the State funds expended to permit verification by the Council that funds were not spent for sectarian purposes." Any question of sectarian

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[3] The requirement, as found by the District Court, that an aided institution not award "primarily" theological or seminary degrees is apparently an expansion, made by the Council in the exercise of its administrative powers, see n. 2, *supra*, of the statutory requirement that the institution not award "only" such degrees.

[4] The District Court in its opinion described the procedures that the Council to that point had evolved for administering the statute. These have since been set out and expanded upon in formal rules and regulations adopted by the Board of Public Works on January 7, 1976. They are entitled "Criteria and Procedures for Aid to Nonpublic Institutions of Higher Education," and they appear in full in 2 Maryland Register 1484–1486 (Oct. 29, 1975). The description of the funding procedure given in the text, as well as the quoted phrasings, are drawn from these regulations. We take judicial notice of them.

use that may arise is to be resolved by the Council, if possible, on the basis of information submitted to it by the institution and without actual examination of its books. Failing that, a "verification or audit" may be undertaken. The District Court found that the audit would be "quick and non-judgmental," taking one day or less. *Id.*, at 1296.[5]

In 1971, $1.7 million was disbursed to 17 private institutions in Maryland. The disbursements were under the statute as originally enacted, and were therefore not subject to § 68A's specific prohibition on sectarian use. Of the 17 institutions, five were church related, and these received $520,000 of the $1.7 million. A total of $1.8 million was to be awarded to 18 institutions in 1972, the second year of the grant program; of this amount, $603,000 was to go to church-related institutions. Before disbursement, however, this suit, challenging the grants as in violation of the Establishment Clause of the First Amendment, was filed.[6] The $603,000 was placed in escrow and was so held until after the entry of the District Court's judgment on October 21, 1974.[7] These and subsequent awards, therefore, are

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[5] Regulation 01.03.05 I. provides in part:

"Any verification or audit shall be conducted with the greatest possible speed and the least possible disruption of the institution's activities and shall be strictly limited to such information and data as is necessary to determine whether or not the sectarian usage prohibition has been violated."

[6] The command of the First Amendment that "Congress shall make no law respecting an establishment of religion," is applicable to the States through the Due Process Clause of the Fourteenth Amendment. See *Everson* v. *Board of Education*, 330 U. S. 1, 8 (1947); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

[7] Some of the escrow funds have been paid out since the entry of the District Court's judgment. Appellants sought an order enjoining these payments pending appeal, but this was denied, first by the District Court and then by this Court. 419 U. S. 1030 (1974).

subject to § 68A and to the Council's procedures for insuring compliance therewith.

Plaintiffs in this suit, appellants here, are four individual Maryland citizens and taxpayers.[8] Their complaint sought a declaration of the statute's invalidity, an order enjoining payments under it to church-affiliated institutions, and a declaration that the State was entitled to recover from such institutions any amounts already disbursed. App. 10. In addition to the responsible state officials,[9] plaintiff-appellants joined as defendants the five institutions they claimed were constitutionally ineligible for this form of aid: Western Maryland College, College of Notre Dame, Mount Saint Mary's College, Saint Joseph College, and Loyola College. Of these, the last four are affiliated with the Roman Catholic Church; Western Maryland, was a Methodist affiliate. The District Court ruled with respect to all five. Western Maryland, however, has since been dismissed as a defendant-appellee. We are concerned, therefore, only with the four Roman Catholic affiliates.[10]

After carefully assessing the role that the Catholic Church plays in the lives of these institutions, a matter to which we return in greater detail below, and applying

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[8] Two organizations, American Civil Liberties Union of Maryland and Protestants and Other Americans United for Separation of Church and State, were also plaintiffs in this suit at its outset. They were dismissed, however, for lack of standing. 387 F. Supp. 1282, 1284 n. 1 (1974).

[9] The Governor, Comptroller, and Treasurer of the State of Maryland were named as defendants, as well as the Board of Public Works.

[10] One of the four institutions, Saint Joseph College, has become defunct since the filing of the suit. It remains a party only insofar as the plaintiff-appellants seek to compel it to repay to the State the funds it received in 1971.

the three-part requirement of *Lemon I*, 403 U. S., at 612–613, that state aid such as this have a secular purpose, a primary effect other than the advancement of religion, and no tendency to entangle the State excessively in church affairs, the District Court ruled that the amended statute was constitutional and was not to be enjoined. The court considered the original, unamended statute to have been unconstitutional under *Lemon I*, but it refused to order a refund of amounts theretofore paid out, reasoning that any refund was barred by the decision in *Lemon* v. *Kurtzman*, 411 U. S. 192 (1973) (*Lemon II*).[11] The District Court therefore denied all relief. This appeal followed. We noted probable jurisdiction. 420 U. S. 922 (1975).

II

A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as

[11] *Lemon II* posed the question of the appropriate relief to be ordered in light of *Lemon I*'s invalidation of the Pennsylvania private school aid statute. Future payments under that statute were enjoined, and there was no claim that the Constitution required the refunding to the State of amounts already paid out. The statute's challengers, however, did seek to enjoin the payment of funds intended to reimburse aided schools for expenses incurred in reliance on the statute prior to its invalidation in *Lemon I*. This Court affirmed the denial of the injunction, reasoning that the payments would not substantially undermine constitutional interests, and that there had been reasonable reliance by the schools on receipt of the funds, especially since the challengers, although they had filed suit before the expenses were incurred, had dropped an attempt to enjoin payments pending the outcome of the litigation.

among religions, and also as between religious and other activities,[12] but a hermetic separation of the two is an impossibility it has never required. It long has been established, for example, that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task. In *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), the Court upheld the extension of public aid to a corporation which, although composed entirely of members of a Roman Catholic sisterhood acting "under the auspices of said church," *id.*, at 297, was limited by its corporate charter to the secular purpose of operating a charitable hospital.

And religious institutions need not be quarantined from public benefits that are neutrally available to all. The Court has permitted the State to supply transportation for children to and from church-related as well as public schools. *Everson* v. *Board of Education*, 330 U. S. 1 (1947). It has done the same with respect to secular textbooks loaned by the State on equal terms to students attending both public and church-related elementary schools. *Board of Education* v. *Allen*, 392 U. S. 236 (1968). Since it had not been shown in *Allen* that the secular textbooks would be put to other than secular purposes, the Court concluded that, as in *Everson*, the State was merely "extending the benefits of state laws to all citizens." *Id.*, at 242. Just as *Bradfield* dispels any notion that a religious person can never be in the State's pay for a secular purpose,[13]

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[12] See, *e. g.*, *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968); *McCollum* v. *Board of Education*, 333 U. S. 203, 209–212 (1948); *Everson* v. *Board of Education*, 330 U. S., at 15–16.

[13] It could scarcely be otherwise, or individuals would be discriminated against for their religion, and the Nation would have to abandon its accepted practice of allowing members of religious orders to serve in the Congress and in other public offices.

Everson and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity. The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends.[14] If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike. The Court also has taken the view that the State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead it into such an intimate relationship with religious authority that it appears either to be sponsoring or to be exces-

[14] See *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973) ("the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends"). See also *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 775 (1973); *Tilton* v. *Richardson*, 403 U. S. 672, 679 (1971) (plurality opinion); *Lemon* v. *Kurtzman*, 403 U. S. 602, 664 (1971) (opinion of WHITE, J.); *Board of Education* v. *Allen*, 392 U. S. 236, 244 (1968); *Everson* v. *Board of Education*, 330 U. S., at 17.

sively interfering with that authority.[15] In *Lemon I* as noted above, the Court distilled these concerns into a three-prong test, resting in part on prior case law, for the constitutionality of statutes affording state aid to church-related schools:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U. S., at 612–613.

At issue in *Lemon I* were two state-aid plans, a Rhode Island program to grant a 15% supplement to the salaries of private, church-related school teachers teaching secular courses, and a Pennsylvania program to reimburse private church-related schools for the entire cost of secular courses also offered in public schools. Both failed the third part of the test, that of "excessive government entanglement." This part the Court held in turn required a consideration of three factors: (1) the character and purposes of the benefited institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the State and the religious authority. *Id.*, at 615. As to the first of these, in reviewing the Rhode Island program, the Court found that the aided schools, elementary and secondary, were characterized by "substantial religious activity and purpose." *Id.*, at 616. They were located near parish churches. Religious instruction was considered "part of the total

[15] The importance of avoiding persistent and potentially frictional contact between governmental and religious authorities is such that it has been held to justify the *extension*, rather than the withholding, of certain benefits to religious organizations. The Court upheld the exemption of such organizations from property taxation partly on this ground. *Walz* v. *Tax Commission*, 397 U. S. 664, 674–675 (1970).

educational process." *Id.*, at 615. Religious symbols and religious activities abounded. Two-thirds of the teachers were nuns, and their operation of the schools was regarded as an " 'integral part of the religious mission of the Catholic Church.' " *Id.*, at 616. The schooling came at an impressionable age. The form of aid also cut against the programs. Unlike the textbooks in *Allen* and the bus transportation in *Everson*, the services of the state-supported teachers could not be counted on to be purely secular. They were bound to mix religious teachings with secular ones, not by conscious design, perhaps, but because the mixture was inevitable when teachers (themselves usually Catholics) were "employed by a religious organization, subject to the direction and discipline of religious authorities, and work[ed] in a system dedicated to rearing children in a particular faith." *Id.*, at 618. The State's efforts to supervise and control the teaching of religion in supposedly secular classes would therefore inevitably entangle it excessively in religious affairs. The Pennsylvania program similarly foundered.

The Court also pointed to another kind of church-state entanglement threatened by the Rhode Island and Pennsylvania programs, namely, their "divisive political potential." *Id.*, at 622. They represented "successive and very likely permanent annual appropriations that benefit relatively few religious groups." *Id.*, at 623. Political factions, supporting and opposing the programs, were bound to divide along religious lines. This was "one of the principal evils against which the First Amendment was intended to protect." *Id.*, at 622. It was stressed that the political divisiveness of the programs was "aggravated . . . by the need for continuing annual appropriations." *Id.*, at 623.[16]

[16] The danger of political divisiveness had been noted by Members of the Court in previous cases. See *Walz* v. *Tax Commission*, 397 U. S., at 695 (opinion of Harlan, J.); *Board of Education* v. *Allen*,

In *Tilton* v. *Richardson*, 403 U. S. 672 (1971), a companion case to *Lemon I*, the Court reached the contrary result. The aid challenged in *Tilton* was in the form of federal grants for the construction of academic facilities at private colleges, some of them church related, with the restriction that the facilities not be used for any sectarian purpose.[17] Applying *Lemon I*'s three-part test, the Court found the purpose of the federal aid program there under consideration to be secular. Its primary effect was not the advancement of religion, for sectarian use of the facilities was prohibited. Enforcement of this prohibition was made possible by the fact that religion did not so permeate the defendant colleges that their religious and secular functions were inseparable. On the contrary, there was no evidence that religious activities took place in the funded facilities. Courses at the colleges were "taught according to the academic requirements intrinsic to the subject matter," and "an atmosphere of academic freedom rather than religious indoctrination" was maintained. 403 U. S., at 680–682 (plurality opinion).

Turning to the problem of excessive entanglement, the Court first stressed the character of the aided institutions. It pointed to several general differences between college and precollege education: College students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level. It found no evidence that the col-

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392 U. S., at 249 (Harlan, J., concurring); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 307 (1963) (Goldberg, J., concurring).

[17] The restriction, as imposed, was to remain in effect for 20 years following construction. Since the Court could not approve the facilities' sectarian use even after a 20-year period, it excised that time limitation from the statute. 403 U. S., at 682–684 (plurality opinion).

leges in *Tilton* varied from this pattern. Though controlled and largely populated by Roman Catholics, the colleges were not restricted to adherents of that faith. No religious services were required to be attended. Theology courses were mandatory, but they were taught in an academic fashion, and with treatment of beliefs other than Roman Catholicism. There were no attempts to proselytize among students, and principles of academic freedom prevailed. With colleges of this character, there was little risk that religion would seep into the teaching of secular subjects, and the state surveillance necessary to separate the two, therefore, was diminished. The Court next looked to the type of aid provided, and found it to be neutral or nonideological in nature. Like the textbooks and bus transportation in *Allen* and *Everson*, but unlike the teachers' services in *Lemon I*, physical facilities were capable of being restricted to secular purposes. Moreover, the construction grant was a one-shot affair, not involving annual audits and appropriations.

As for political divisiveness, no "continuing religious aggravation" over the program had been shown, and the Court reasoned that this might be because of the lack of continuity in the church-state relationship, the character and diversity of the colleges, and the fact that they served a dispersed student constituency rather than a local one. "[C]umulatively," all these considerations persuaded the Court that church-state entanglement was not excessive. 403 U. S., at 684–689.

In *Hunt* v. *McNair*, 413 U. S. 734 (1973), the challenged aid was also for the construction of secular college facilities, the state plan being one to finance the construction by revenue bonds issued through the medium of a state authority. In effect, the college serviced and repaid the bonds, but at the lower cost resulting from the tax-free status of the interest payments. The Court upheld the program on reasoning analogous to that in

Tilton. In applying the second of the *Lemon I*'s three-part test, that concerning "primary effect," the following refinement was added:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U. S., at 743.

Although the college which *Hunt* concerned was subject to substantial control by its sponsoring Baptist Church, it was found to be similar to the colleges in *Tilton* and not "pervasively sectarian." As in *Tilton*, state aid went to secular facilities only, and thus not to any "specifically religious activity." 413 U. S., at 743–745.

Committee for Public Education v. *Nyquist*, 413 U. S. 756 (1973), followed in *Lemon I*'s wake much as *Hunt* followed in *Tilton*'s. The aid in *Nyquist* was to elementary and secondary schools which, the District Court found, generally conformed to a "profile" of a sectarian or substantially religious school.[18] The state aid took three forms: direct subsidies for the maintenance and repair of buildings; reimbursement of parents for a percentage of tuition paid; and certain tax benefits for parents. All three forms of aid were found to have an impermissible primary effect. The mainte-

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[18] The elements of the "profile" were that the schools placed religious restrictions on admission and also faculty appointments; that they enforced obedience to religious dogma; that they required attendance at religious services and the study of particular religious doctrine; that they were an " 'integral part' " of the religious mission of the sponsoring church; that they had religious indoctrination as a " 'substantial purpose' "; and that they imposed religious restrictions on how and what the faculty could teach. 413 U. S., at 767–768.

nance and repair subsidies, being unrestricted, could be used for the upkeep of a chapel or classrooms used for religious instruction. The reimbursements and tax benefits to parents could likewise be used to support wholly religious activities.

In *Levitt* v. *Committee for Public Education,* 413 U. S. 472 (1973), the Court also invalidated a program for public aid to church-affiliated schools. The grants, which were to elementary and secondary schools in New York, were in the form of reimbursements for the schools' testing and recordkeeping expenses. The schools met the same sectarian profile as did those in *Nyquist,* at least in some cases. There was therefore "substantial risk" that the state-funded tests would be "drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." 413 U. S., at 480.

Last Term, in *Meek* v. *Pittenger,* 421 U. S. 349 (1975), the Court ruled yet again on a state-aid program for church-related elementary and secondary schools. On the authority of *Allen,* it upheld a Pennsylvania program for lending textbooks to private school students. It found, however, that *Lemon I* required the invalidation of two other forms of aid to the private schools. The first was the loan of instructional materials and equipment. Like the textbooks, these were secular and nonideological in nature. Unlike the textbooks, however, they were loaned directly to the schools. The schools, similar to those in *Lemon I,* were ones in which "the teaching process is, to a large extent, devoted to the inculcation of religious values and belief." 421 U. S., at 366. Aid flowing directly to such "religion-pervasive institutions," *ibid.,* had the primary effect of advancing religion. See *Hunt* v. *McNair, supra.* The other form of aid was the provision of "auxiliary" educational serv-

ices: remedial instruction, counseling and testing, and speech and hearing therapy. These also were intended to be neutral and nonideological, and in fact were to be provided by public school teachers. Still, there was danger that the teachers, in such a sectarian setting, would allow religion to seep into their instruction. To attempt to prevent this from happening would excessively entangle the State in church affairs. The Court referred again to the danger of political divisiveness, heightened, as it had been in *Lemon I* and *Nyquist*, by the necessity of annual legislative reconsideration of the aid appropriation. 421 U. S., at 372.

So the slate we write on is anything but clean. Instead, there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles, so recently reaffirmed, see *Meek* v. *Pittenger*, *supra*, or to expand upon them substantially, but merely to insure that they are faithfully applied in this case.

III

The first part of *Lemon I*'s three-part test is not in issue; appellants do not challenge the District Court's finding that the purpose of Maryland's aid program is the secular one of supporting private higher education generally, as an economic alternative to a wholly public system.[19] The focus of the debate is on the second and third parts, those concerning the primary effect of ad-

[19] The program grew out of a study conducted by the Council of the tenuous financial condition of Maryland's private colleges. All such colleges are eligible for aid, the church-related ones constituting less than one-third of those benefited. As noted above, five church-related colleges were made original defendants in this action, yet a total of 17 institutions were aided in 1971, and 18 were eligible in 1972.

vancing religion, and excessive church-state entanglement. We consider them in the same order.

A

While entanglement is essentially a procedural problem, the primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. *Hunt* requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded.

(1) The District Court's finding in this case was that the appellee colleges are not "pervasively sectarian." 387 F. Supp., at 1293. This conclusion it supported with a number of subsidiary findings concerning the role of religion on these campuses:

(a) Despite their formal affiliation with the Roman Catholic Church, the colleges are "characterized by a high degree of institutional autonomy." *Id.*, at 1287 n. 7. None of the four receives funds from, or makes reports to, the Catholic Church. The Church is represented on their governing boards, but, as with Mount Saint Mary's, "no instance of entry of Church considerations into college decisions was shown." *Id.*, at 1295.

(b) The colleges employ Roman Catholic chaplains and hold Roman Catholic religious exercises on campus. Attendance at such is not required; the encouragement of spiritual development is only "one secondary objective" of each college; and "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience." *Ibid.* It was the District Court's general finding that "religious indoctrination is not a substantial purpose or activity of any of these defendants." *Id.*, at 1296.

(c) Mandatory religion or theology courses are taught at each of the colleges, primarily by Roman Catholic clerics, but these only supplement a curriculum covering "the spectrum of a liberal arts program." Nontheology courses are taught in an "atmosphere of intellectual freedom" and without "religious pressures." [20] Each college subscribes to, and abides by, the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors. *Id.*, at 1288, 1293, and n. 3, 1295.

(d) Some classes are begun with prayer. The percentage of classes in which this is done varies with the college, from a "minuscule" percentage at Loyola and Mount Saint Mary's, to a majority at Saint Joseph. *Id.*, at 1293. There is no "actual college policy" of encouraging the practice. "It is treated as a facet of the instructor's academic freedom." *Ibid.* Classroom prayers were therefore regarded by the District Court as "peripheral to the subject of religious permeation," as were the facts that some instructors wear clerical garb and some classrooms have religious symbols. *Ibid.* The court concluded:

"None of these facts impairs the clear and con-

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[20] The District Court did not make the same finding with respect to theology and religion courses taught at the appellee colleges. It made no contrary finding, but simply was "unable to characterize the course offerings in these subjects." There was a "possibility" that "these courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline." The court considered this possibility sufficient to require that the Council for Higher Education take steps to insure that no public funds would be used to support religion and theology programs. 387 F. Supp., at 1287–1288, 1295–1296. The Council has complied. See n. 22, *infra*. There being no cross-appeal from the District Court judgment, this aspect of its ruling is not before us, and we express no opinion as to it.

> vincing evidence that courses at each defendant are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.' [citing *Tilton* v. *Richardson*, 403 U. S., at 681]." *Id.*, at 1293–1294.

In support of this finding the court relied on the fact that a Maryland education department group had monitored the teacher education program at Saint Joseph College, where classroom prayer is most prevalent, and had seen "no evidence of religion entering into any elements of that program." *Id.*, at 1293.

(e) The District Court found that, apart from the theology departments, see n. 20, *supra*, faculty hiring decisions are not made on a religious basis. At two of the colleges, Notre Dame and Mount Saint Mary's, no inquiry at all is made into an applicant's religion. Religious preference is to be noted on Loyola's application form, but the purpose is to allow full appreciation of the applicant's background. Loyola also attempts to employ each year two members of a particular religious order which once staffed a college recently merged into Loyola. Budgetary considerations lead the colleges generally to favor members of religious orders, who often receive less than full salary. Still, the District Court found that "academic quality" was the principal hiring criterion, and that any "hiring bias," or "effort by any defendant to stack its faculty with members of a particular religious group," would have been noticed by other faculty members, who had never been heard to complain. *Id.*, at 1294.

(f) The great majority of students at each of the colleges are Roman Catholic, but the District Court concluded from a "thorough analysis of the student ad-

mission and recruiting criteria" that the student bodies "are chosen without regard to religion." *Id.*, at 1295.

We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. Not surprisingly, they have gleaned from this record of thousands of pages, compiled during several weeks of trial, occasional evidence of a more sectarian character than the District Court ascribes to the colleges. It is not our place, however, to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts. That is certainly not the case here, and it would make no difference even if we were to second-guess the District Court in certain particulars. To answer the question whether an institution is so "pervasively sectarian" that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements. The general picture that the District Court has painted of the appellee institutions is similar in almost all respects to that of the church-affiliated colleges considered in *Tilton* and *Hunt*.[21] We

[21] The plurality opinion described the colleges under consideration in *Tilton* in this manner:

"All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of

find no constitutionally significant distinction between them, at least for purposes of the "pervasive sectarianism" test.

(2) Having found that the appellee institutions are not "so permeated by religion that the secular side cannot be separated from the sectarian," 387 F. Supp., at 1293, the District Court proceeded to the next question posed by *Hunt:* whether aid in fact was extended only to "the secular side." This requirement the court regarded as satisfied by the statutory prohibition against sectarian use, and by the administrative enforcement of that prohibition through the Council for Higher Education. We agree. *Hunt* requires only that state funds not be used to support "specifically religious activity." It is clear that fund uses exist that meet this require-

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the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally, as we have noted, these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." 403 U. S., at 686–687.

To be sure, in this case the District Court was unable to find, as was stipulated in *Tilton,* that mandatory theology or religion courses are taught without taint of religious indoctrination. See n. 20, *supra.* This is not inconsistent, however, with the District Court's finding of a lack of pervasive sectarianism. The latter condition would exist only if, because of the institution's general character, courses other than religion or theology courses could not be funded without fear of religious indoctrination.

The role of the affiliated church appears, if anything, to have been stronger in *Hunt* than in this case. The Baptist College at Charleston, before us in *Hunt,* was controlled by the South Carolina Baptist Convention to the extent that the Convention elected all members of the Board of Trustees, and retained the power to approve certain financial transactions, as well as any amendment of the College's charter. 413 U. S., at 743.

ment. See *Tilton* v. *Richardson, supra; Hunt* v. *McNair, supra.* We have no occasion to elaborate further on what is and is not a "specifically religious activity," for no particular use of the state funds is set out in this statute. Funds are put to the use of the college's choice, provided it is not a sectarian use, of which the college must satisfy the Council. If the question is whether the statute sought to be enjoined authorizes state funds for "specifically religious activity," that question fairly answers itself. The statute in terms forbids the use of funds for "sectarian purposes," and this prohibition appears to be at least as broad as *Hunt*'s prohibition of the public funding of "specifically religious activity." We must assume that the colleges, and the Council, will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate. It is to be expected that they will give a wide berth to "specifically religious activity," and thus minimize constitutional questions.[22]

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[22] The Council, at least, thus far has shown every sign of doing so. For example, appellants have pointed during this litigation to three assertedly sectarian uses in which state funds either have been or could be employed under this statute: the salaries of teachers teaching religion or theology courses, scholarships for students in religious studies, and maintenance of buildings used for religious activity. Brief for Appellants 50–55. (The alleged instances of actual use in these ways related to the 1971 funds.) However, the Council has now adopted regulations specifically prohibiting the use of state funds in these and other ways:

"A. Art. 77A, § 68A, Annotated Code of Maryland, prohibits recipient institutions from using State funds for 'sectarian purposes.' That provision generally proscribes the use of State funds to support religious instruction, religious worship, or other activities of a religious nature. Listed below are several potential uses of State funds which would violate the sectarian use prohibition. The list is not intended to be all-inclusive and, if an institution is in doubt whether any other possible use of the funds might violate the sec-

Should such questions arise, the courts will consider them. It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds. See, *e. g., Hunt* v. *McNair,* 413 U. S., at 744; *Tilton* v. *Richardson,* 403 U. S., at 682 (plurality opinion).

B

If the foregoing answer to the "primary effect" ques-

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tarian use prohibition, it should consult with and seek the advice of the Council in advance.

"(1) Student Aid: State funds may not be used for student aid if the institution imposes religious restrictions or qualifications on eligibility for student aid, nor may they be paid to students then enrolled in a religious, seminarian, or theological academic program.

"(2) Salaries: State funds may not be used to pay in whole or in part the salary of any person who is engaged in the teaching of religion or theology, who serves as chaplain or director of the campus ministry, or who administers or supervises any program of religious activities.

"(3) Maintenance and Repair: State funds may not be used to pay any portion of the cost of maintenance or repair of any building or facility used for the teaching of religion or theology or for religious worship or for any religious activity.

"(4) Utilities: If an institution has any building or facility that is used in whole or in part for the teaching of religion or theology or for religious worship or for any religious activity, State funds may not be used to pay utilities bills unless those buildings or facilities are separately metered. If buildings or facilities used for any religious purpose described in the preceding sentence are separately metered, the cost of providing heat, electricity, and water to those buildings or facilities cannot be paid with State funds.

"(5) Capital Construction and Improvements: If State funds are used to construct a new building or facility or to renovate an existing one, the building or facility may not be used for the teaching of religion or theology or for religious worship or for any religious activity at any time in the future." Regulation 01.03.06A. See n. 4, *supra.*

tion seems easy, it serves to make the "excessive entanglement" problem more difficult. The statute itself clearly denies the use of public funds for "sectarian purposes." It seeks to avert such use, however, through a process of annual interchange—proposal and approval, expenditure and review—between the colleges and the Council. In answering the question whether this will be an "excessively entangling" relationship, we must consider the several relevant factors identified in prior decisions:

(1) First is the character of the aided institutions. This has been fully described above. As the District Court found, the colleges perform "essentially secular educational functions," 387 F. Supp., at 1288, that are distinct and separable from religious activity. This finding, which is a prerequisite under the "pervasive sectarianism" test to any state aid at all, is also important for purposes of the entanglement test because it means that secular activities, for the most part, can be taken at face value. There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity—the study of biology, the learning of a foreign language, an athletic event—will actually be infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced. Thus the District Court found that in this case "there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education." *Id.*, at 1289. We cannot say the District Court erred in this judgment or gave it undue significance. The Court took precisely the same view with respect to the aid extended to the very similar institutions in *Tilton*. 403 U. S., at 687 (plurality opinion). See also *Hunt* v. *McNair*, *supra*, at 746.

(2) As for the form of aid, we have already noted that no particular use of state funds is before us in this case. The *process* by which aid is disbursed, and a use for it chosen, is before us. We address this as a matter of the "resulting relationship" of secular and religious authority.

(3) As noted, the funding process is an annual one. The subsidies are paid out each year, and they can be put to annually varying uses. The colleges propose particular uses for the Council's approval, and, following expenditure, they report to the Council on the use to which the funds have been put.

The District Court's view was that in light of the character of the aided institutions, and the resulting absence of any need "to investigate the conduct of particular classes," 387 F. Supp., at 1289, the annual nature of the subsidy was not fatal. In fact, an annual, ongoing relationship had existed in *Tilton*, where the Government retained the right to inspect subsidized buildings for sectarian use, and the ongoing church-state involvement had been even greater in *Hunt*, where the State was actually the lessor of the subsidized facilities, retaining extensive powers to regulate their use. See 387 F. Supp., at 1290.

We agree with the District Court that "excessive entanglement" does not necessarily result from the fact that the subsidy is an annual one. It is true that the Court favored the "one-time, single-purpose" construction grants in *Tilton* because they entailed "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures." 403 U. S., at 688 (plurality opinion). The present aid program cannot claim these aspects. But if the question is whether this case is more like *Lemon I* or more like *Tilton*—and surely that is the

fundamental question before us—the answer must be that it is more like *Tilton*.

Tilton is distinguishable only by the form of aid. We cannot discount the distinction entirely, but neither can we regard it as decisive. As the District Court pointed out, ongoing, annual supervision of college facilities was explicitly foreseen in *Tilton*, 403 U. S., at 675; see also *Lemon I*, 403 U. S., at 669 (opinion of WHITE, J.), and even more so in *Hunt*, 413 U. S., at 739–740, 745–749. *Tilton* and *Hunt* would be totally indistinguishable, at least in terms of annual supervision, if funds were used under the present statute to build or maintain physical facilities devoted to secular use. The present statute contemplates annual decisions by the Council as to what is a "sectarian purpose," but, as we have noted, the secular and sectarian activities of the colleges are easily separated. Occasional audits are possible here, but we must accept the District Court's finding that they would be "quick and non-judgmental." 387 F. Supp., at 1296. They and the other contacts between the Council and the colleges are not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges' accreditations by the State.

While the form-of-aid distinctions of *Tilton* are thus of questionable importance, the character-of-institution distinctions of *Lemon I* are most impressive. To reiterate a few of the relevant points: The elementary and secondary schooling in *Lemon I* came at an impressionable age; the aided schools were "under the general supervision" of the Roman Catholic diocese; each school had a local Catholic parish that assumed "ultimate financial responsibility" for it; the principals of the schools were usually appointed by church authorities; religion "pervade[d] the school system"; teachers were specifically instructed by the "Handbook of School Regula-

tions" that " '[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area.' " 403 U. S., at 617–618. These things made impossible what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes. The District Court gave primary importance to this consideration, and we cannot say it erred.

(4) As for political divisiveness, the District Court recognized that the annual nature of the subsidy, along with its promise of an increasing demand for state funds as the colleges' dependency grew, aggravated the danger of "[p]olitical fragmentation . . . on religious lines." *Lemon I*, 403 U. S., at 623. Nonetheless, the District Court found that the program "does not create a substantial danger of political entanglement." 387 F. Supp., at 1291. Several reasons were given. As was stated in *Tilton*, the danger of political divisiveness is "substantially less" when the aided institution is not an elementary or secondary school, but a college, "whose student constituency is not local but diverse and widely dispersed." 403 U. S., at 688–689. Furthermore, political divisiveness is diminished by the fact that the aid is extended to private colleges generally, more than two-thirds of which have no religious affiliation; this is in sharp contrast to *Nyquist*, for example, where 95% of the aided schools were Roman Catholic parochial schools. Finally, the substantial autonomy of the colleges was thought to mitigate political divisiveness, in that controversies surrounding the aid program are not likely to involve the Catholic Church itself, or even the religious character of the schools, but only their "fiscal responsi-

bility and educational requirements." 387 F. Supp., at 1290–1291.

The District Court's reasoning seems to us entirely sound. Once again, appellants urge that this case is controlled by previous cases in which the form of aid was similar (*Lemon I, Nyquist, Levitt*), rather than those in which the character of the aided institution was the same (*Tilton, Hunt*). We disagree. Though indisputably relevant, see *Lemon I*, 403 U. S., at 623–624, the annual nature of the aid cannot be dispositive. On the one hand, the Court has *struck down* a "permanent," nonannual tax exemption, reasoning that "the pressure for frequent enlargement of the relief is predictable," as it always is. *Committee for Public Education* v. *Nyquist*, 413 U. S., at 797. On the other hand, in *Tilton* it has *upheld* a program for "one-time, single-purpose" construction grants, despite the fact that such grants would, in fact, be "annual," at least insofar as new grants would be annually applied for. 403 U. S., at 688. See *Lemon I*, 403 U. S., at 669 (opinion of WHITE, J.). Our holdings are better reconciled in terms of the character of the aided institutions, found to be so dissimilar as between those considered in *Tilton* and *Hunt*, on the one hand, and those considered in *Lemon I*, *Nyquist*, and *Levitt*, on the other.

There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of "*excessive* entanglement," itself makes that clear. The relevant factors we have identified are to be considered "cumulatively" in judging the degree of entanglement. *Tilton* v. *Richardson*, 403 U. S., at 688. They may cut different ways, as certainly they do here. In reaching the conclusion that it did, the District Court gave dominant importance to the character of the aided institutions and to its finding that they are capable of separating secular and religious functions. For the rea-

sons stated above, we cannot say that the emphasis was misplaced or the finding erroneous.[23]

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

While I join in the judgment of the Court, I am unable to concur in the plurality opinion substantially for the reasons set forth in my opinions in *Lemon* v.

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[23] We have discussed in the text only the constitutionality of the amended statute. Our approval of that statute does not dispose of the claim, made in the District Court, that the colleges must refund amounts paid in 1971 under the unamended statute. As noted, the District Court rejected this claim on the authority of *Lemon II*. See n. 11, *supra*. While their position is not entirely clear to us, appellants do not appear to challenge this aspect of the District Court ruling. They assert in this Court that "the appellee institutions should be required to refund all payments *not enjoined upon timely filed motions or application*." Brief for Appellants 76 (emphasis added). There were no "motions or applications," indeed no suit at all, until well after the 1971 payments had been made. Appellants also speak of repayments being necessary in order that there be some remedy "as to public funds paid to the appellee institutions during at least three fiscal years (1972–73, 1973–74, 1974–75)." *Id.*, at 79–80. From these statements, and from the fact that appellants premise their argument for repayment upon their "vigorous efforts to enjoin payment and preserve the status quo pending litigation," *id.*, at 80, we take it that they seek repayment only of funds paid out after the commencement of this suit, and despite their efforts to enjoin such payments. See n. 7, *supra*.

In any event, the District Court's ruling with respect to the 1971 payments was clearly in keeping with *Lemon II*. In that case, this Court identified two considerations primarily relevant to the question of retroactive remedy: (1) the reasonableness and degree of reliance by the institutions on the payments, and (2) the necessity of refunds to protect the substantive constitutional rights involved. Reliance was, if anything, less reasonable in *Lemon II*, where at least a suit had been filed prior to the time the reliance occurred. The

Kurtzman, 403 U. S. 602 (1971) (*Lemon I*), and *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973). I am no more reconciled now to *Lemon I* than I was when it was decided. See *Nyquist, supra*, at 820 (WHITE, J., dissenting). The threefold test of *Lemon I* imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing "when the State's involvement with religion passes the peril point" for First Amendment purposes. *Id.*, at 822.

"It is enough for me that the [State is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged." *Lemon I, supra*, at 664 (opinion of WHITE, J.). As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason—particularly in light of the "sparse language of the Establishment Clause," *Committee for Public Education* v. *Nyquist, supra*, at 820—to take the constitutional inquiry further. See *Lemon I, supra*, at 661 (opinion of WHITE, J.); *Nyquist, supra*, at 813 (WHITE, J., dissenting). However, since 1970, the Court has added a third element to the inquiry: whether there is "an excessive government entanglement with religion." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970). I have never understood the constitutional foundation for this added element; it is at once both insolubly paradoxical, see *Lemon I, supra*, at

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degree of reliance was also, if anything, less in *Lemon II*. There the colleges had not yet received the funds in question, but had simply incurred expenses in expectation of receiving them. The funds in question here long since have been paid out to, and spent by, the colleges. As for the protection of substantive constitutional rights, the separation of church and state may well be better served by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges. Cf. *Walz* v. *Tax Comm'n*, 397 U. S., at 674.

668, and—as the Court has conceded from the outset—a "blurred, indistinct, and variable barrier." *Lemon I, supra,* at 614. It is not clear that the "weight and contours of entanglement as a separate constitutional criterion," *Nyquist, supra,* at 822, are any more settled now than when they first surfaced. Today's plurality opinion leaves the impression that the criterion really may not be "separate" at all. In affirming the District Court's conclusion that the legislation here does not create an "excessive entanglement" of church and state, the plurality emphasizes with approval that "the District Court gave dominant importance to the character of the aided institutions and to its finding that they are capable of separating secular and religious functions." *Ante,* at 766. Yet these are the same factors upon which the plurality focuses in concluding that the Maryland legislation satisfies the second part of the *Lemon I* test: that on the record the "appellee colleges are not 'pervasively sectarian,' " *ante,* at 755, and that the aid at issue was capable of, and is in fact, extended only to " 'the secular side' " of the appellee colleges' operations. *Ante,* at 759. It is unclear to me how the first and third parts of the *Lemon I* test are substantially different.* The "excessive entanglement" test appears no less "curious and mystifying" than when it was first announced. *Lemon I, supra,* at 666.

I see no reason to indulge in the redundant exercise of evaluating the same facts and findings under a different label. No one in this case challenges the District

*Our prior cases demonstrate that the question of whether aid programs satisfy the "excessive entanglement" test depends at least to some extent on the degree to which the Court accepts lower courts' findings of fact. Cf., *e. g., Lemon I,* 403 U. S., at 665–667 (opinion of WHITE, J.); *Meek* v. *Pittenger,* 421 U. S. 349, 392 (1975) (opinion of REHNQUIST, J.).

Court's finding that the purpose of the legislation here is secular. *Ante*, at 754. And I do not disagree with the plurality that the primary effect of the aid program is not advancement of religion. That is enough in my view to sustain the aid programs against constitutional challenge, and I would say no more.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with Judge Bryan, dissenting from the judgment under review, that the Maryland Act *"in these instances* does in truth offend the Constitution by its provisions of funds, in that it exposes State money for use in advancing religion, no matter the vigilance to avoid it." 387 F. Supp. 1282, 1298 (1974) (emphasis in original). Each of the institutions is a church-affiliated or church-related body. The subsidiary findings concerning the role of religion on each of the campuses, summarized by the plurality opinion, *ante*, at 755–758, conclusively establish that fact. In that circumstance, I agree with Judge Bryan that "[o]f telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose. . . . Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college." 387 F. Supp., at 1298–1299. In other words, the Act provides for payment of general subsidies to religious institutions from public funds and I have heretofore expressed my view that "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 690 (1970) (concurring opinion). This is because general subsidies "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." *Abington School Dist.* v.

Schempp, 374 U. S. 203, 236 (1963) (BRENNAN, J., concurring). "What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which . . . serve the essentially religious activities of religious institutions." *Id.,* at 294–295.

The history of the bitter controversies over public subsidy of sectarian educational institutions that began soon after the Nation was formed is recited in my separate opinion in *Lemon* v. *Kurtzman,* 403 U. S. 602, 642 (1971) (*Lemon I*). My reasons for concluding in *Lemon I* that all three statutes there before us impermissibly provided a direct subsidy from public funds for activities carried on by sectarian educational institutions also support my agreement with Judge Bryan in this case that "an injunction should issue as prayed in the complaint, stopping future payments under the Maryland Act to the [appellee] colleges." 387 F. Supp., at 1300. I said in *Lemon I, supra,* at 659–660:

> "I believe that the Establishment Clause forbids . . . Government to provide funds to sectarian universities in which the propagation and advancement of a particular religion are a function or purpose of the institution. . . .
>
> "I reach this conclusion for [these] reasons . . . : the necessarily deep involvement of government in the religious activities of such an institution through the policing of restrictions, and the fact that subsidies of tax monies directly to a sectarian institution necessarily aid the proselytizing function of the institution. . . .
>
> ". . . I do not believe that [direct] grants to such a sectarian institution are permissible. The reason is not that religion 'permeates' the secular education that is provided. Rather, it is that the secular edu-

> cation is provided within the environment of religion; the institution is dedicated to two goals, secular education *and* religious instruction. When aid flows directly to the institution, both functions benefit." (Emphasis in original.)

The discrete interests of government and religion are mutually best served when each avoids too close a proximity to the other. "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *Abington School Dist.* v. *Schempp, supra,* at 259 (BRENNAN, J., concurring). The Maryland Act requires "too close a proximity" of government to the subsidized sectarian institutions and in my view creates real dangers of the "secularization of a creed." *Ibid.; Lemon I, supra,* at 649 (opinion of BRENNAN, J.).

Unlike Judge Bryan, 387 F. Supp., at 1300, I would also reverse the District Court's denial of appellants' motion that the appellee institutions be required to refund all payments made to them. I adhere to the views expressed in Mr. Justice Douglas' dissent, which I joined, in *Lemon* v. *Kurtzman,* 411 U. S. 192, 209 (1973) (*Lemon II*):

> "There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involves last year, the current year, or next year. . . .
>
> "Whether the grant is for . . . last year or at the present time, taxpayers are forced to contribute to sectarian schools a part of their tax dollars."

I would reverse the judgment of the District Court and remand with directions to enter a new judgment per-

manently enjoining the Board of Public Works of the State of Maryland from implementing the Maryland Act, and requiring the appellee institutions to refund all payments made to them pursuant to the Act.

MR. JUSTICE STEWART, dissenting.

In my view, the decisive differences between this case and *Tilton* v. *Richardson*, 403 U. S. 672, lie in the nature of the theology courses that are a compulsory part of the curriculum at each of the appellee institutions and the type of governmental assistance provided to these church-affiliated colleges. In *Tilton* the Court emphasized that the theology courses were taught as academic subjects.

> "Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis." *Id.*, at 686–687.

Here, by contrast, the District Court was unable to find that the compulsory religion courses were taught as an academic discipline.

> "[T]he hiring patterns for religion or theology departments are a special case and present a unique problem. All five defendants staff their religion or theology departments chiefly with clerics of the affiliated church. At two defendants, Western

Maryland and Mt. St. Mary's, *all* members of the religion or theology faculty are clerics. The problem presented by the make-up of these departments is obvious. Recognition of the academic freedom of these instructors does not necessarily lead to a conclusion that courses in the religion or theology departments at the five defendants have no overtones of indoctrination.

. . . . .

"The theology and religion courses of each defendant must be viewed in the light of that shared objective [of encouraging spiritual development of the students]. While most of the defendants do not offer majors in religion or theology, each maintains a vigorous religion or theology department. The primary concern of these departments, either admittedly or by the obvious thrust of the courses, is Christianity. As already noted, the departments are staffed almost entirely with clergy of the affiliated church. At each of the defendants, certain of these courses are required.

". . . [A] department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience." 387 F. Supp. 1282, 1294–1296 (emphasis in original).

In light of these findings, I cannot agree with the plurality's assertion that there is "no constitutionally significant distinction" between the colleges in *Tilton* and those in the present case. *Ante*, at 759. The findings in *Tilton* clearly established that the federal building-construction grants benefited academic institutions that made no attempt to inculcate the religious beliefs of the affiliated church. In the present case, by contrast,

the compulsory theology courses may be "devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline." 387 F. Supp., at 1288. In view of this salient characteristic of the appellee institutions and the noncategorical grants provided to them by the State of Maryland, I agree with the conclusion of the dissenting member of the three-judge court that the challenged Act "*in these instances* does in truth offend the Constitution by its provisions of funds, in that it exposes State money for use in advancing religion, no matter the vigilance to avoid it." *Id.*, at 1298 (emphasis in original).

For the reasons stated, and those expressed by MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS, I dissent from the judgment of the Court and the plurality's opinion.

MR. JUSTICE STEVENS, dissenting.

My views are substantially those expressed by MR. JUSTICE BRENNAN. However, I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.

FLINT RIDGE DEVELOPMENT CO. *v.* SCENIC RIVERS ASSOCIATION OF OKLAHOMA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75–510. Argued April 27, 1976—Decided June 24, 1976*

The Interstate Land Sales Full Disclosure Act (Disclosure Act), which is designed to prevent false and deceptive practices in the interstate sale of unimproved tracts of land by requiring developers to disclose information needed by potential purchasers, requires a developer to register a subdivision by filing with the Department of Housing and Urban Development (HUD) a statement of record containing information concerning title of the land, the terms and conditions for disposing of lots, the conditions of the subdivision, including access, noise, safety, sewage, utilities, proximity to municipalities, the nature of the developer's proposed improvements, various other specified data, and such additional matters as the Secretary of HUD may require as being reasonably necessary or appropriate for the protection of purchasers. Such statement of record becomes effective automatically on the 30th day after filing unless the Secretary determines that it is on its face incomplete or materially inaccurate, in which case the effective date is suspended until 30 days after the developer files the information necessary to complete or correct the statement. After the petitioner developer had filed a statement of record with HUD concerning a certain subdivision, but before the statement became effective, respondent environmental organizations requested HUD to prepare an environmental impact statement on the development before allowing the statement of record to go into effect. Upon HUD's refusal to do so, the organizations brought suit against the Secretary and the Administrator of HUD's Office of Interstate Land Sales Registration, seeking a declaratory judgment and an injunction requiring them, prior to registering the developer's statement of record, to conduct an environmental study in compliance with the National Environmental Policy Act of 1969 (NEPA), which requires all federal agencies "to the full-

*Together with No. 75–545, *Hills, Secretary of Housing and Urban Development, et al.* v. *Scenic Rivers Association of Oklahoma et al.*, also on certiorari to the same court.

est extent possible" to include "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement analyzing the consequences of, and alternatives to, the proposed action. The District Court ruled for the organizations, holding that NEPA's requirements applied to HUD and ordering it to prepare an environmental impact statement before approving the developer's statement of record. The Court of Appeals affirmed. *Held:* NEPA's environmental impact statement requirement is inapplicable to this case. Even if the Secretary's allowing a disclosure statement to become effective constituted "major federal action significantly affecting the quality of the human environment" within the meaning of NEPA so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty, since the Secretary cannot comply with the duty under the Disclosure Act to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments. Pp. 785–793.

(a) While NEPA's instruction that all federal agencies comply with the impact statement requirement "to the fullest extent possible" is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle, nevertheless NEPA recognizes that where a clear and unavoidable conflict in statutory authority exists, NEPA must yield. Pp. 787–788.

(b) The Disclosure Act does not leave the Secretary discretion to suspend the effective date of the proposed statement of record for such time as is necessary to prepare an impact statement, but rather mandates that the statement of record's effective date shall be the 30th day after filing with the sole exception that the Secretary is empowered to suspend the effective date for inadequate disclosure. Pp. 788–791.

520 F. 2d 240, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except POWELL, J., who took no part in the consideration or decision of the cases.

F. Paul Thieman, Jr., argued the cause for petitioners in No. 75–510. With him on the briefs were *Harry A.*

Rissetto, Edwin Kronfeld, and *Thomas C. Watson. Howard E. Shapiro* argued the cause for petitioners in No. 75–545. With him on the brief were *Solicitor General Bork, Assistant Attorney General Taft, Deputy Solicitor General Randolph, Carl Strass,* and *K. H. Sauerbrunn.*

Andrew T. Dalton, Jr., argued the cause and filed a brief for respondents in both cases.†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Today we must decide whether the National Environmental Policy Act of 1969 (NEPA) requires the Department of Housing and Urban Development (HUD) to prepare an environmental impact statement before it may allow a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act (Disclosure Act) to become effective.

I

The Disclosure Act, 82 Stat. 590, as amended, 15 U. S. C. § 1701 *et seq.*, is designed to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers. The Act is based on the full disclosure provisions and philosophy of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*, which it resembles in many respects. Section 1404 (a) (1) of the Disclosure Act makes it unlawful for the devel-

†Briefs of *amici curiae* urging affirmance in both cases were filed by *Evelle J. Younger,* Attorney General, and *Nicholas C. Yost* and *C. Foster Knight,* Deputy Attorneys General, for the State of California; and by *Toney Anaya,* Attorney General, and *Nicholas R. Gentry,* Assistant Attorney General, for the State of New Mexico.

oper of a covered subdivision "to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails . . . to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect . . . and a printed property report . . . is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser." 15 U. S. C. § 1703 (a)(1).

The statement of record and the property report, which is a condensed version of the statement of record, are prepared by the developer. They contain information concerning the title of the land; the terms and conditions for disposing of lots; the conditions of the subdivision, including access, noise, safety, sewage, utilities, proximity to municipalities, and the nature of the developer's proposed improvements; various other specified data; and such additional matters "as the Secretary [of HUD] may require as being reasonably necessary or appropriate for the protection of purchasers." § 1406 (12) of the Disclosure Act, 15 U. S. C. § 1705.[1] By regulation, the

[1] Section 1406, 15 U. S. C. § 1705, provides in full:

"The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

"(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

"(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

"(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

"(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

"(5) a statement of the present condition of access to the sub-

property report is a required part of the statement of record.[2] 24 CFR §§ 1710.20 (a), (e), 1710.110 (1975).

A developer registers a subdivision by filing the state-

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division, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

"(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

"(7) (A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

"(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

"(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

"(10) copies of instruments creating easements or other restrictions;

"(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

"(12) such other information and such other documents and

[*Footnote 2 is on p. 781*]

ment of record, including the property report, with HUD. The statement, which is effective only with respect to the lots specified therein, becomes effective automatically on the 30th day after filing, or on such earlier date as the Secretary may determine. §§ 1405, 1407 (a) of the Disclosure Act, 15 U. S. C. §§ 1704, 1706 (a). If the Secretary determines that the statement of record is on its face incomplete or inaccurate in any material respect, and so notifies the developer within 30 days of filing, the effective date is suspended until 30 days after the developer files the information necessary to complete or correct the report. § 1407 (b) of the Disclosure Act, 15 U. S. C. § 1706 (b).[3] If the statement is on its face complete and accurate, however, it must be permitted to go into effect. The Secretary has no power to evaluate the substance of the developer's proposal; and the Disclosure Act expressly provides: "The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way

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certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers."

[2] The information required to be included in a property report is described in § 1408 (a) of the Disclosure Act, 15 U. S. C. § 1707 (a):

"A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1406 [15 U. S. C. § 1705]. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers."

[3] Upon suspension, the developer may request a hearing, which must be held within 20 days. § 1407 (b) of the Disclosure Act, 15 U. S. C. § 1706 (b).

passed upon the merits of, or given approval to, such subdivision." § 1417 of the Disclosure Act, 15 U. S. C. § 1716. Moreover, the Act prohibits any person from advertising or representing that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. §§ 1408 (b), 1417 of the Disclosure Act, 15 U. S. C. §§ 1707 (b), 1716.[4]

Petitioner Flint Ridge Development Co. (Flint Ridge) is a private joint venture organized to develop and sell lots in a subdivision located in northeastern Oklahoma adjacent to the Illinois River. In February 1974, the company filed with HUD a statement of record and property report relating to "Flint Ridge No. 1," which consists of approximately 1,000 residential lots on 2,200 acres of company land. The Secretary found the statement to be inaccurate and incomplete on its face, and suspended its effective date. Flint Ridge subsequently filed corrections and the amended statement became effective on May 2, 1974. Sales of lots commenced immediately thereafter.

Respondents Scenic Rivers Association of Oklahoma and Illinois River Conservation Council are nonprofit Oklahoma corporations organized for the purpose of protecting the Illinois River, a state-designated "scenic" river, and its undeveloped environs, which some members use for recreation. After Flint Ridge filed its statement of record, but before it became effective, respondents petitioned HUD to prepare an environmental impact statement on the development prior to allowing the statement of record to go into effect. HUD rejected the re-

[4] The disclosure requirements of the Act are enforceable by both private and Government civil remedies, §§ 1404 (b), 1410, 1415 of the Disclosure Act, 15 U. S. C. §§ 1703 (b), 1709, 1714, and by criminal sanctions, §§ 1415, 1418 of the Disclosure Act, 15 U. S. C. §§ 1714, 1717.

quest and respondents brought suit in the United States District Court for the Eastern District of Oklahoma against the Secretary of HUD and the Administrator of HUD's Office of Interstate Land Sales Registration.[5] Respondents requested a declaratory judgment and an injunction requiring that the defendants "prior to approval and registration of a statement of record and property report, under the Interstate Land Sales Act, conduct an environmental study in compliance with the National Environmental Policy Act [83 Stat. 852, 42 U. S. C. § 4321 *et seq.*] . . . ." Record 593. Respondents also sought a preliminary injunction to require the federal defendants to "[w]ithdraw the approval of the Interstate Land Sales filing for the Flint Ridge Development Company . . . ." *Id.*, at 597–598. The District Court permitted Flint Ridge to intervene as a defendant.

After a hearing, the District Court ruled for the respondents. It found that the requirements of NEPA applied to HUD and that its action in allowing Flint Ridge's statement of record to go into effect constituted major federal action significantly affecting the quality of the human environment so as to require the preparation and filing of an environmental impact statement under NEPA. The court thereupon suspended Flint Ridge's statement of record, prohibited public sale thereunder, ordered the preparation of an environmental impact statement, and enjoined HUD "from approving the . . . filing of Flint Ridge Development Co. until such time as the environmental impact study has been prepared and a public hearing held thereon . . . ." 382 F. Supp. 69, 76 (1974).

On appeal, the Court of Appeals for the Tenth Cir-

[5] The District Court dismissed other federal and state agencies named in the complaint as "additional defendants." Record 581, 658.

cuit reversed the District Court's holding that a public hearing was necessary on the environmental impact statement,[6] but affirmed the remainder of the District Court's decision. The Court of Appeals agreed with the District Court that HUD's review of disclosure statements for adequacy constituted major federal action significantly affecting the quality of the human environment within the meaning of NEPA. The real estate development, the court reasoned, would have "substantial consequences to the environment," 520 F. 2d 240, 244 (1975), and those consequences would come about most readily through the interstate sales that federal approval of the disclosure statement would allow.[7] Thus, the court held, this case is similar to those in which federal agencies approve particular projects, license them, or supply funding or financial guarantees.

The Court of Appeals deemed it immaterial to its decision that the purpose of the Disclosure Act was only to provide necessary information to potential buyers and that under the Act the Secretary had only the limited discretion to reject statements of record that were incomplete or inaccurate. These limitations were irrelevant, the court concluded, because "the NEPA impact statement requirement applies to virtually all federal agencies and is not limited to those that are concerned with the environment. One of its purposes is to require the giving of attention to environmental problems regardless

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[6] Since respondents did not seek certiorari on this ruling, its correctness is not before us. However, because we find that no environmental impact statement was necessary before the Secretary could permit Flint Ridge's statement of record to become effective, *a fortiori* no hearing on an environmental impact statement was required in this case.

[7] The court recognized that even absent federal approval the project could go ahead so long as the lots were not sold in interstate commerce. 520 F. 2d, at 244.

of whether the agency has authority to do anything about it." *Id.*, at 245 (footnote omitted). Likewise, the court found, it was of no import that the Disclosure Act provides that statements of record become effective within 30 days unless suspended. Although it would take much longer to prepare an impact statement, the 30-day provision was not inconsistent with the court's holding because "[t]here is nothing in the statute . . . which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement." *Id.*, at 244. We granted certiorari, 423 U. S. 1013 (1975), and we now reverse.

II

Section 102 (2)(C) of NEPA, 42 U. S. C. § 4332 (2)(C), requires all agencies of the United States "to the fullest extent possible" to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement analyzing the consequences of, and alternatives to, the proposed action.[8] The Secretary and Flint

[8] In pertinent part, § 102, 42 U. S. C. § 4332, provides:

"The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall . . .

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources

Ridge offer essentially two theories for exempting HUD from this duty in the administration of the Disclosure Act.

First, they claim, allowing a disclosure statement to become effective is not major federal action significantly affecting the quality of the human environment within the meaning of NEPA. In petitioners' view, NEPA is concerned only with introducing environmental considerations into the decisionmaking processes of agencies that have the ability to react to environmental consequences when taking action. If the agency cannot so act, its action is not "major" and does not fall within the statutory language. Thus, petitioners urge, NEPA should not be read to impose a duty on HUD to prepare an environmental impact statement in this case since the agency, by statute, has no power to take environmental consequences into account in deciding whether to allow a disclosure statement to become effective. To this respondents counter, as did the Court of Appeals, that NEPA's goals are not so narrow and that even if the agency taking action is itself powerless to protect the environment, preparation and circulation of an impact statement serves the valuable function of bringing the environmental consequences of federal actions to the attention of those who are empowered to do something

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which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . ."

about them—other federal agencies, Congress, state agencies, or even private parties.

Petitioner's second argument is that even if HUD's action in allowing a disclosure statement to become effective constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA, HUD is nonetheless exempt from the duty of preparing an environmental impact statement because compliance with that duty is not possible if HUD is also to comply with the Disclosure Act's requirement that statements of record become effective within 30 days of filing, unless incomplete or inaccurate on their face. In response to this claim, respondents contend that the Secretary has an inherent power to suspend the effective date of a statement of record past the 30-day deadline in order to prepare an impact statement. Because we reject this argument of respondents and find that preparation of an impact statement is inconsistent with the Secretary's mandatory duties under the Disclosure Act, we need not resolve petitioners' first contention.

NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all the other requirements of § 102—"to the fullest extent possible," 42 U. S. C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees, who wrote the "fullest extent possible" language into NEPA:

> "The purpose of the new language is to make it clear that each agency of the Federal Government *shall* comply with the directives set out in [§ 102 (2)] *unless* the existing law applicable to such

> agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . . Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." 115 Cong. Rec. 39703 (1969) (House conferees) (emphasis added).

See *id.*, at 40418 (Senate conferees). See also 40 CFR § 1500.4 (a) (1975).

Section 102 recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States* v. *SCRAP*, 412 U. S. 669, 694 (1973), "NEPA was not intended to repeal by implication any other statute." And so the question we must resolve is whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with the Secretary's duties under the Disclosure Act.

The Disclosure Act provides that a statement of record becomes effective automatically 30 days after filing unless the Secretary acts affirmatively, within that time, to suspend it for inadequate disclosure. 15 U. S. C. § 1706.[9] It is inconceivable that an environmental im-

[9] Compare § 8 (a) of the Securities Act of 1933, 15 U. S. C. § 77h (a), which provides that the registration statement for a

pact statement could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments.[10] Respondents do not contend otherwise. Rather, they take the position, accepted by the Court of Appeals, that the statute does not preclude the Secretary from suspending the effective date of the proposed statement for such time as is necessary to prepare an impact statement.[11]

We find, to the contrary, that the Disclosure Act leaves

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securities offering becomes effective within 20 days after it is filed, in the absence of a delaying amendment by the registrant or a stop order proceeding by the Securities and Exchange Commission.

[10] Draft environmental impact statements on simple projects prepared by experienced personnel take some three to five months to complete, at least in the Department of the Interior. Complex projects prepared by inexperienced personnel may take up to 18 months to prepare. Sixth Annual Report, Council on Environmental Quality (CEQ) 639 (1975).

Once a draft statement is prepared, CEQ guidelines provide that "[t]o the maximum extent practicable" no action should be taken sooner than 90 days after a draft environmental impact statement (and 30 days after the final statement) has been made available for comment. 40 CFR § 1500.11 (b) (1975). Agencies commenting on a draft statement are to have at least 45 days to make their comments. 40 CFR § 1500.9 (f) (1975).

[11] Respondents also contend that HUD's own guidelines require it to prepare an impact statement before a disclosure statement becomes effective under the Disclosure Act. This claim is spurious. The document on which respondents rely, HUD Handbook 1390.1, the Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, 38 Fed. Reg. 19182 *et seq.* (1973), amended 39 Fed. Reg. 38922 (1974), by its own terms does not apply to registrations under the Disclosure Act. Section 1 of the handbook states that its provisions apply to "HUD legislative proposals, policy and guidance documents (including guides, regulations, handbooks, circulars, technical standards, etc.) and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects." 38 Fed. Reg. 19182 (1973). Subdivision registrations do not fall within any of these categories.

the Secretary no such discretion. The Act mandates that "[e]xcept as hereinafter provided, the effective date of a statement of record . . . *shall* be the thirtieth day after the filing thereof . . . ." § 1407 (a), 15 U. S. C. § 1706 (a) (emphasis added). The only exception to this mandatory command that is "hereinafter provided" is the power granted the Secretary to suspend the effective date of a statement "[i]f it appears to the Secretary that a statement of record . . . is on its face incomplete or inaccurate in any material respect . . . ." § 1407 (b), 15 U. S. C. § 1706 (b).[12] Thus, while the Secretary may unquestionably suspend an effective date in order to allow the developer to remedy an inadequate disclosure statement, there is no basis in the statute to allow the Secretary to order such a suspension so as to give HUD time to prepare an impact statement.

Not only does the Court of Appeals' opinion grant the Secretary a power not conferred by statute, but the exer-

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[12] Sections 1407 (c) and (d) grant the Secretary the additional power to suspend already effective statements of record, but do not expand upon the Secretary's limited discretion to extend the time requirements of the Act.

Under § 1407 (d), the Secretary may suspend an already effective statement, after notice and hearing, only if the Secretary determines that it includes an untrue statement of a material fact or omits to state any material fact necessary to make the statement not misleading. 15 U. S. C. § 1706 (d).

Under § 1407 (c), upon receipt of an amendment to a statement of record, the Secretary may, if the Secretary determines "such action to be necessary or appropriate in the public interest or for the protection of purchasers," suspend the statement of record until the amendment becomes effective. 15 U. S. C. § 1706 (c). While this provision gives the Secretary greater flexibility in deciding whether to suspend a statement of record, it does not affect the Act's time limits. The amendment must become effective within 30 days unless it is inaccurate or incomplete. § 1407 (a) of the Disclosure Act, 15 U. S. C. § 1706 (a).

cise of that power ordered by the court would contravene the purpose of the 30-day provision of the Disclosure Act. The 30-day time limit, as the Court of Appeals recognized, is designed to protect developers from costly delays as a result of the need to register with HUD. Yet, the Court of Appeals' reading of the statute would make such delays commonplace, and render the 30-day provision little more than a nullity. Environmental impact statements, and consequent lengthy suspensions, would be necessary in virtually all cases.[13]

In sum, even if the Secretary's action in this case constituted major federal action significantly affecting the quality of the human environment so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty. The Secretary cannot comply with the statutory duty to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments. In these circumstances, we find that NEPA's impact statement requirement is inapplicable.

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[13] It is no answer to suggest, as respondents do, that the limit could be met if the Secretary ordered the developer not to file its statement of record until HUD completed an environmental impact statement. This proposal is no more than a circumvention of the statute's language, and is equally violative of its purpose.

The Court of Appeals alternatively suggested that "a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement." 520 F. 2d, at 244. This suggestion would still not allow compliance with the 30-day rule. The agency could not fruitfully begin the impact statement until the developer's plans were fully or largely worked out—at which time the developer would be virtually ready to file his disclosure statement and begin sales.

This is not to say that environmental concerns are irrelevant to the Disclosure Act or that the Secretary has no duties under NEPA. Section 1406 (5) of the Disclosure Act recognizes that disclosure of some of the environmental aspects of a subdivision is necessary to protect prospective purchasers and requires such disclosure in the statement of record and property report. 15 U. S. C. § 1705 (5). The developer must provide information on such factors as roads, water, sewage, drainage, soil erosion, climate, nuisances, natural hazards, municipal services, and zoning restrictions. Moreover, §§ 1406 (12) and 1408 (a) confer on the Secretary authority to require "other information" from developers in their statements of record and property reports, both for the "protection of purchasers" and "in the public interest." [14] Therefore, if the Secretary finds it necessary for the protection of purchasers or in the public interest, the Secretary may adopt rules requiring developers to incorporate a wide range of environmental information into property reports to be furnished prospective purchasers; and respondents may request the Secretary to institute a rulemaking proceeding to consider the desirability of ordering such disclosure. 5 U. S. C. § 553 (e).

Because the courts below erred in ordering the Secretary to prepare an impact statement before allowing

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[14] Section 1406 (12) only gives the Secretary the power to order the inclusion in statements of record of information necessary for "the protection of purchasers." See n. 1, *supra*. However, § 1408 (a) allows the Secretary to order the inclusion in property reports of information necessary for "the protection of purchasers" or "in the public interest." See n. 2, *supra*. Since, by regulation, the property report must be included in the statement of record, 24 CFR §§ 1710.20 (a), (e), 1710.110 (1975), information necessary "in the public interest" may, in effect, be required in the statement of record as well.

Flint Ridge's statement of record to go into effect, the judgment of the Court of Appeals for the Tenth Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

HUGHES, SECRETARY OF TRANSPORTATION OF MARYLAND, ET AL. *v.* ALEXANDRIA SCRAP CORP.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 74–1607. Argued January 21, 1976—Decided June 24, 1976

As part of a complex plan for ridding the State of abandoned automobiles, a Maryland statute provided that anyone in possession of an inoperable automobile over eight years old ("hulk") could transfer it to a licensed scrap processor, who then could claim a "bounty" from the State for its destruction, without delivery to the processor or subsequent submission to the State of any documentation of title. In 1974 the statute was amended to require a processor to submit title documentation in order to receive a bounty. But the documentation requirements differ as between a processor with a plant in Maryland and an out-of-state processor. The former need only submit an "indemnity agreement" in which an unlicensed hulk supplier certifies his own right to the hulk and agrees to indemnify the processor for any third-party claims arising from its destruction; the non-Maryland processor must submit either a certificate of title, a police certificate vesting title, or a bill of sale from a police auction. Appellee is a Virginia processor participating in the Maryland plan whose supply of bounty-eligible hulks received from Maryland sources declined after enactment of the 1974 amendment. Appellee brought suit claiming that the amendment violated the Commerce Clause and denied appellee equal protection of the laws. A three-judge District Court granted summary judgment for appellee, and enjoined Maryland from giving further effect to the part of the 1974 amendment that restricts the right to obtain bounties based on indemnity agreements to Maryland processors only. *Held:*

1. The amendment does not constitute an impermissible burden on interstate commerce in violation of the Commerce Clause. Pp. 802–810.

(a) Maryland's amendment of its statute was not the kind of action with which the Commerce Clause is concerned. Maryland has not sought to prohibit the interstate flow of hulks or to regulate the conditions under which the flow may occur, but

rather has entered into the market itself by offering bounties to bid up the price of hulks; an impact on interstate commerce has occurred only because the amendment made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland instead of taking them out of the State. Pp. 804–806.

(b) Nothing in the purposes of the Commerce Clause forbids a State's entry into the market as purchaser of potential articles of interstate commerce where the State restricts its trade to its own citizens. Although the practical effect of the 1974 amendment was to channel the benefits of the bounties to domestic processors, no trade barrier of the type forbidden by the Commerce Clause impedes movement of hulks out of the State. Pp. 807–810.

2. Nor does the 1974 amendment deny appellee equal protection of the laws. The amendment's distinction between domestic and foreign scrap processors, complemented by the reasonable assumptions that hulks delivered to Maryland processors are likely to have been abandoned in Maryland, and those delivered to non-Maryland processors are likely to have been abandoned outside Maryland, bears a rational relationship to the basic statutory purpose of using state funds to clear Maryland's landscape of abandoned automobiles. That is all the Constitution requires in the case of economic legislation. That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely does not warrant a conclusion that the method it chose is unconstitutional. Pp. 810–814.

391 F. Supp. 46, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 814. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 817.

Henry R. Lord, Deputy Attorney General of Maryland, argued the cause for appellants. With him on the briefs were *Francis B. Burch*, Attorney General, and *J. Michael McWilliams* and *Glenn E. Bushel*, Assistant Attorneys General.

Norman P. Ramsey argued the cause for appellee.

With him on the brief were *H. Thomas Howell* and *Alan N. Gamse.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves a two-pronged constitutional attack on a recent amendment to one part of a complex Maryland plan for ridding that State of abandoned automobiles. The three-judge District Court agreed with appellee, a Virginia scrap processor that participates in the plan, that the amendment violated the Commerce Clause and denied appellee equal protection of the laws. We disagree on both points.

I

The 1967 session of the Maryland Legislature commissioned a study to suggest some way to deal with the growing aesthetic problem of abandoned automobiles. The study concluded that the root of the problem was the existence of bottlenecks in the "scrap cycle," the course that a vehicle follows from abandonment to processing into scrap metal for ultimate re-use by steel mills. At its 1969 session, the legislature responded by enacting a comprehensive statute designed to speed up the scrap cycle by using state money both as a carrot and as a stick.[1] The statute is intricate, but its provisions relevant to this case may be sketched briefly.

The legislative study had found that one of the bottlenecks occurred in the junkyards of wrecking companies, which tended to accumulate vehicles for the resale value of their spare parts. The statute's stick designed to clear this bottleneck is a requirement that a Maryland wrecker

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[1] 1969 Md. Laws, c. 556. The law, as amended, is codified at Md. Ann. Code, Art. 66½, § 5–201 *et seq.* (1970 ed. and Supp. 1975).

desiring to keep abandoned vehicles on its premises must obtain a license and pay a recurring fine for any vehicle of a specified age retained for more than a year.[2] The study had identified as another cause of sluggishness in the scrap cycle the low profits earned by wreckers and others for delivering vehicles to scrap processors. The carrot written into the statute to remedy this problem is a "bounty" paid by the State for the destruction, by a processor licensed under the statute, of any vehicle formerly titled in Maryland.[3] When a wrecker licensed under the statute to stockpile vehicles delivers one of them for scrapping it shares the bounty equally with the processor. The processor receives the entire bounty when it destroys a vehicle supplied by someone other than a licensed wrecker.[4]

These penalty and bounty provisions work with elementary laws of economics to speed up the scrap cycle. The penalty for retention of vehicles, plus the prospect of sharing the bounty, work in tandem to encourage licensed wreckers to move vehicles to processors. The bounties to processors on vehicles from unlicensed suppliers also encourage those suppliers to deliver to the processors, because the processors are able to pay higher than normal market prices by sharing the bounties with them.[5]

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[2] Md. Ann. Code, Art. 66½, §§ 5–202, 5–203 (d) (Supp. 1975).

[3] Md. Ann. Code, Art. 66½, § 5–205 (Supp. 1975).

[4] In addition to receiving vehicles from licensed wreckers, processors receive them from the owners of the vehicles themselves and, more frequently, from unlicensed wreckers who tow an abandoned or wrecked vehicle directly to a processor rather than retaining it for its spare-part value.

[5] The bounty started at $10 per vehicle and moved up to $16 by the time of this suit. As noted in the text, *supra*, a licensed wrecker receives half of this sum directly from the State. A profit margin for unlicensed suppliers is assured by the willingness of processors, who need a fairly constant supply of hulks to run their

The penalty and bounty provisions, however, did not remove another impediment to the smooth functioning of the scrap cycle that was legal rather than economic in origin. This was the possibility of suits for conversion against a processor by owners who might claim that they had not abandoned their vehicles. To meet this problem the statute specified several documents with which a processor could prove clear title to a vehicle, and required that a processor obtain one of these documents from its supplier and submit it to the State as a condition of receiving the bounty. One of the documents, called a "Wrecker's Certificate," can be given only by a wrecker licensed under the statute.[6] It is essentially a clear title that the wrecker secures by following statutory notice procedures at the time it first obtains a vehicle. Suppliers other than licensed wreckers must provide some other document—either a properly endorsed certificate of title, a certificate from a police department vesting title in the supplier after statutory notices, or a bill of sale from a police auction.[7]

These documentation requirements, although vital for the protection of processors, are themselves some slight encumbrance upon the free transfer of abandoned vehicles to processors. Apparently in recognition of this fact, and the reduced potential for owners' claims in the case of ancient automobiles, the statute placed vehicles over eight years old and inoperable ("hulks") into a special category. Section 11–1002.2 (f)(5) of the stat-

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expensive machinery efficiently, to "rebate" most of the bounty. Appellee, for example, regularly pays $14 of the current $16 bounty to its unlicensed suppliers.

[6] Md. Ann. Code, Art. 66½, § 5–203 (b), (c) (1970 ed. and Supp. 1975).

[7] Md. Ann. Code, Art. 66½, §§ 5–203.1, 11–1002.2 (f)(1–4), 11–1002.2 (a–d) (1970 ed. and Supp. 1975).

ute, as originally enacted, provided in substance that anyone in possession of a hulk could transfer it to a scrap processor, and the processor could claim a bounty for its destruction, without delivery to the processor or subsequent submission to the State of *any* documentation of title.[8]

A

The statute extends its burdens of fines, and its benefits in the form of a share in bounties, only to wreckers that maintain junkyards located in Maryland, and requires a license only of those wreckers. There is no similar residency requirement for scrap processors that wish to obtain a license and participate in the bounty program,[9] and in fact seven of the 16 scrap processors that have participated are located in either Pennsylvania or Virginia. Appellee, a Virginia corporation with a processing plant near the Potomac River in Alexandria, was an original licensee under the Maryland statute. Presumably because of its proximity to the southern Maryland

[8] Maryland Ann. Code, Art. 66½, § 11–1002.2 (f)(5) (1970), as originally enacted, read as follows:

"Notwithstanding any other provisions of this section, any person, firm, corporation, or unit of government upon whose property or in whose possession any *abandoned* motor vehicle is found, or any person being the owner of a motor vehicle whose title certificate is faulty, or destroyed, may dispose of the motor vehicle to a wrecker or scrap processor *without the title and without notification procedures* of subsection (c) [subsections (a) and (b)] of this section, *if the motor vehicle is over eight years old and has no engine or is otherwise totally inoperable.*" (Emphasis supplied.)

[9] A participating processor must meet statutory requirements relating to its storage area for vehicles, its records and books of account, and its processing equipment. Md. Ann. Code, Art. 66½, § 5–202 (Supp. 1975). An administrative regulation promulgated pursuant to the statute requires that a licensed non-Maryland processor maintain an "office" within the State approved by the State Motor Vehicle Administration. Md. A. R. R. § 11.02.05.45.

and Washington, D. C., areas, appellee attracted enough Maryland-titled vehicles to its plant to rank third among licensed processors in receipt of bounties through the summer of 1974.

As is apparently the case with most of the licensed processors, virtually all (96%) of the bounty-eligible vehicles processed by appellee during that period were hulks, upon which appellee did not have to demand title documentation from its suppliers in order later to receive the bounty. In the summer of 1974, however, Maryland changed significantly the treatment of hulks by amending § 11–1002.2 (f)(5).[10] Under the law as amended it is no longer possible for a licensed scrap processor to receive a bounty on a hulk without submitting title documentation to the State. But the documentation required of a processor whose plant is in Maryland differs from that required of a processor, like appellee, whose plant

[10] 1974 Md. Laws, c. 465. The amendment did not change the wording of the original section, n. 8, *supra*, but added the following language:

"In those cases only, a scrap processor whose plant is physically located and operating in this State shall execute an indemnity agreement that shall be filed with the Motor Vehicle Administration. The indemnity agreement shall contain the name, address and signature of the person delivering the vehicle. The indemnity agreement and the manufacturer's serial or identification number shall be satisfactory proof that the vehicle has been destroyed and shall be acceptable for payment of the full bounty authorized by section 5–205 if the vehicle identified in the indemnity agreement was titled in this State. Otherwise, for the purpose of administering the provisions of this section, the provisions of section 5–205 shall not apply."

Section 5–205, mentioned in the amendment, is the only statutory provision authorizing bounty payments. See *supra*, at 797. Without the benefit of § 11–1002.2 (f)(5) following the 1974 amendment, out-of-state processors must depend upon other sections that authorize a § 5–205 bounty only upon more elaborate title documentation. See *supra*, at 798.

is not in Maryland. The former need only submit a simple document in which the person who delivered the hulk certified his own right to it and agreed to indemnify the processor for any third-party claims arising from its destruction. Hulk processors long had required such "indemnity agreements" from their hulk suppliers as a matter of industry practice. The effect of the 1974 amendment is to give these agreements legal recognition and to require one when a Maryland processor applies for a bounty on a hulk. The non-Maryland processor, however, cannot submit a simple indemnity agreement. For it, receipt of a bounty on a hulk now depends upon the same documentation specified for abandoned vehicles in general: a certificate of title, a police certificate vesting title, a bill of sale from a police auction, or—in the case of licensed wreckers only—a Wrecker's Certificate.

B

The complaint in this case was filed shortly after the effective date of the amendment to § 11–1002.2 (f)(5). Papers submitted to the three-judge District Court on summary judgment indicated that enactment of the amendment had been followed by a precipitate decline in the number of bounty-eligible hulks supplied to appellee's plant from Maryland sources.[11] Appellee attributed the decline primarily to the effect of the amendment upon the decision of unlicensed suppliers as to where to

[11] Appellee submitted an affidavit of its general manager containing statistics that showed the decline. During the six-month period immediately preceding the effective date of the amendment, appellee received 14,253 hulks from Maryland sources. In the six months immediately thereafter, the total was 9,723. This marked a decline of 31.8% in the number of bounty-eligible hulks, at a time when appellee's figures showed an *increase* of 11.9% in the number of vehicles supplied from non-Maryland sources.

dispose of their hulks.[12] It is easier for an unlicensed supplier to sign an indemnity agreement upon delivering a hulk to a processor than it is for it to secure some form of title documentation. Because only a Maryland processor can use an indemnity agreement to obtain a bounty, the amendment gave Maryland processors an advantage over appellee and other non-Maryland processors in the competition for bounty-eligible hulks from unlicensed suppliers. Such hulks therefore now tend to remain in State instead of moving to licensed processors outside Maryland.

Appellee contended below that the 1974 amendment to § 11–1002.2 (f)(5) violated the Commerce Clause by interfering with, or "burdening," the flow of bounty-eligible hulks across state lines, and denied appellee equal protection of the laws by discriminating arbitrarily between it and licensed processors located in Maryland as to the right to claim bounties on hulks by submitting indemnity agreements. The District Court granted summary judgment to appellee on both claims, and enjoined the State of Maryland from giving further effect to that part of the 1974 amendment which restricts the right to obtain bounties based on indemnity agreements to Maryland processors only. 391 F. Supp. 46. The State appealed, and we noted probable jurisdiction. 423 U. S. 819.

II

In this Court appellee relies on the Commerce Clause

[12] Appellee's figures showed that the number of hulks delivered by licensed wreckers, which before and after the amendment tended to use Wrecker's Certificates almost exclusively, more than doubled in the six months following the amendment (from 1,934 vehicles in the preceding six months to a total of 4,161 vehicles). The number of hulks delivered by unlicensed suppliers, however, plummeted by 54.9%, from 12,319 during the six months before the amendment to 5,561 in the comparable period thereafter.

argument that was adopted by the District Court. The argument starts from the premise, well established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand. See *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366, 370–371 (1976). Appellee concedes that until the 1974 amendment the Maryland system operated in conformity with the common-market principle. There was free competition among licensed processors for Maryland hulks from unlicensed suppliers and an unimpeded flow of such hulks out of Maryland to appellee and other non-Maryland processors. The only effect of the bounty was to enhance the value of hulks and thus make it more likely that they would be moved to processing plants.

The practical effect of the amendment, however, was to limit the enhanced price available to unlicensed suppliers to hulks that stayed inside Maryland, thus discouraging such suppliers from taking their hulks out of State for processing. The result was that the movement of hulks in interstate commerce was reduced.[13] Appellee

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[13] The amendment did not accomplish this effect directly. After the amendment it still was possible for licensed non-Maryland processors to receive bounty-eligible hulks from unlicensed Maryland suppliers. But because it was significantly easier for those suppliers to obtain an enhanced price from Maryland processors, they tended to deliver inside the State. The practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors. Indeed, this is the way appellee characterized the operation of the amendment:

"Old and inoperable hulks continued to fetch an 'artifically enhanced value' for their suppliers, but only if delivered intrastate to 'a scrap processor whose plant is physically located and operating' in Maryland. Old and inoperable hulks exported for processing in contiguous states were ineligible for bounty and sold at much

contends that this effect of the 1974 amendment is a "burden" on interstate commerce, the permissibility of which must be determined under the test of *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). The Court there stated that "the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." See also *Great A&P Tea Co.* v. *Cottrell, supra,* at 371–372.

The District Court accepted appellee's analysis, and concluded that the 1974 amendment failed the *Pike* test. First, the court found that the amendment did impose "substantial burdens upon the free flow of interstate commerce." 391 F. Supp., at 62. Moreover, it considered the disadvantage suffered by out-of-state processors to be particularly suspect under previous decisions of this Court, noting that to avoid the disadvantage those processors would have to build new plants inside Maryland to carry on a business which, prior to the amendment, they had pursued efficiently outside the State. See *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1 (1928); *Pike* v. *Bruce Church, Inc., supra,* at 145. Maryland's principal argument in support of the amendment was that, by making it difficult for out-of-state processors to claim bounties on hulks delivered by unlicensed suppliers, the amendment tends to reduce the amount of state funds paid for destruction of Maryland-titled hulks abandoned in the States where those processors are

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lower prices prevailing on the free market for scrap metal. For towing services and other unlicensed suppliers, in business for profit and attracted by high prices, transactions with licensed processors beyond Maryland's borders now entailed financial sacrifice. Accordingly, their hulks were withdrawn from interstate commerce and delivered for processing within Maryland for the bounty-generated rebates which only Maryland-based processors could provide." Brief for Appellee 34.

located instead of in Maryland. The District Court acknowledged the validity of this interest, but considered the means employed inappropriate under *Pike* because the same interest could have been furthered, with less impact upon interstate commerce, by amending the statute to condition the bounty upon a hulk's abandonment in Maryland instead of its previous titling there.[14]

This line of reasoning is not without force if its basic premise is accepted. That premise is that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden. But we are not persuaded that Maryland's action in amending its statute was the kind of action with which the Commerce Clause is concerned.

The situation presented by this statute and the 1974 amendment is quite unlike that found in the cases upon which appellee relies. In the most recent of those cases, *Pike* v. *Bruce Church, supra,* a burden was found to be imposed by an Arizona requirement that fresh fruit grown in the State be packed there before shipment interstate. The requirement prohibited the interstate shipment of fruit in bulk, no matter what the market demand for such shipments. In *H. P. Hood & Sons* v. *Du Mond,* 336 U. S. 525 (1949), a New York official denied a license to a milk distributor who wanted to open a new plant at which to receive raw milk from New York farmers for immediate shipment to Boston. The denial blocked a potential increase in the interstate movement of raw milk. Appellee also relies upon *Toomer* v. *Witsell,* 334 U. S. 385 (1948), in which this Court found interstate commerce in raw shrimp to be burdened by a South Carolina requirement that shrimp boats fishing off its coast dock in South Carolina and pack and pay taxes on their catches before trans-

[14] Cf. *infra,* Part III.

porting them interstate. The requirement increased the cost of shipping such shrimp interstate. In *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928), a Louisiana statute forbade export of Louisiana shrimp until they had been shelled and beheaded, thus impeding the natural flow of freshly caught shrimp to canners in other States. Both *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1925), and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (1922), involved efforts by North Dakota to regulate and thus disrupt the interstate market in grain by imposing burdensome regulations upon and controlling the profit margin of corporations that purchased grain in State for shipment and sale outside the State. And in *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), the Court found a burden upon the established interstate commerce in natural gas when a new West Virginia statute required domestic producers to supply all domestic needs before piping the surplus, if any, to other States.

The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. There has been an impact upon the interstate flow of hulks only because, since the 1974 amendment, Maryland effectively has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland rather than take them outside the State.[15]

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[15] Again, we emphasize that the 1974 amendment, by its terms, does not *require* unlicensed suppliers to deliver hulks in State to receive enhanced prices. This is simply its effect in practice, and this is the way appellee itself views the amendment as operating. See n. 13, *supra*. To whatever extent unlicensed suppliers still take

Appellee recognizes that the situation presented by this case is without precedent in this Court. It argues that the 1974 amendment nevertheless must be subjected to the same scrutiny as the state actions in earlier cases, because "[w]hat is controlling . . . is not the means by which Maryland has chosen to discriminate, but the practical effect of that discrimination upon interstate commerce." Brief for Appellee 63. In short, appellee urges that the alleged burden upon interstate commerce from the 1974 amendment "is not immunized by its novelty." *Ibid.*

We believe, however, that the novelty of this case is not its presentation of a new form of "burden" upon commerce, but that appellee should characterize Maryland's action as a burden which the Commerce Clause was intended to make suspect. The Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution.[16] This

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hulks from Maryland to appellee and other non-Maryland processors, of course, there has been no interruption of interstate commerce.

[16] "It was . . . to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. They were the proximate cause of our national existence down to today.

"As evils are wont to do, they dictated the character and scope of their own remedy. This lay specifically in the commerce clause. No prohibition of trade barriers as among the states could have been effective of its own force or by trade agreements. . . . Power adequate to make and enforce the prohibition was required. Hence, the necessity for creating an entirely new scheme of government." W. Rutledge, A Declaration of Legal Faith 25–26 (1947). See *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 533–535 (1949).

aspect of the Clause's purpose was eloquently expressed by Mr. Justice Jackson:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. . . ." *H. P. Hood & Sons* v. *Du Mond*, *supra*, at 539.

In realizing the Founders' vision this Court has adhered strictly to the principle "that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it." *Id.*, at 535.[17] But until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

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[17] The cases upon which appellee primarily relies, and which are discussed in the text, *supra*, at 805–806, illustrate that this principle makes suspect any attempt by a State to restrict or regulate the flow of commerce out of the State. The same principle, of course, makes equally suspect a State's similar effort to block or to regulate the flow of commerce into the State. See, *e. g.*, *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361 (1964). See generally *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976).

We do not believe the Commerce Clause was intended to require independent justification for such action. Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment. As the means of furthering this purpose, it elected the payment of state funds—in the form of bounties—to encourage the removal of automobile hulks from Maryland streets and junkyards. It is true that the state money initially was made available to licensed out-of-state processors as well as those located within Maryland, and not until the 1974 amendment was the financial benefit channeled, in practical effect, to domestic processors. But this chronology does not distinguish the case, for Commerce Clause purposes, from one in which a State offered bounties only to domestic processors from the start.[18] Regardless of when the State's largesse is first confined to domestic processors, the effect upon the flow of hulks resting within the State is the same: they will tend to be processed inside the State rather than flowing to foreign processors. But no

[18] We note that the commerce affected by the 1974 amendment appears to have been created, in whole or in substantial part, by the Maryland bounty scheme. We would hesitate to hold that the Commerce Clause forbids state action reducing or eliminating a flow of commerce dependent for its existence upon state subsidy instead of private market forces. Because the record contains no details of the hulk market prior to the bounty scheme, however, this issue is not clearly presented.

We also note that appellee undertook to build no new plant nor add additional machinery in reliance upon the prospect of receiving additional hulks under the Maryland bounty scheme. Instead, appellee stipulated in the District Court that participation in the program has caused no alteration in its method of operation. We intimate no view as to the consequences, if any, in a Commerce Clause case of a different state of facts in this respect. Cf. *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 587 (1923); F. Ribble, State and National Power over Commerce 219 (1937).

trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State. Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action,[19] from participating in the market and exercising the right to favor its own citizens over others.[20]

III

The District Court also found the 1974 amendment to be violative of the Equal Protection Clause.[21] Appellee

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[19] Our reference to the absence of congressional action implies no view on whether Congress could prohibit the type of selective participation in the market undertaken by Maryland. It is intended only to emphasize that this case involves solely the restrictions upon state power imposed by the Commerce Clause when Congress is silent.

[20] Appellee and the other licensed non-Maryland processors are free to withdraw from the bounty program should they decide that the benefits they receive from it after the 1974 amendment do not justify the annual license fee. They are not in the position of a foreign business which enters a State in response to completely private market forces to compete with domestic businesses, only to find itself burdened with discriminatory taxes or regulations. See, *e. g., Best & Co.* v. *Maxwell,* 311 U. S. 454 (1940); *Nippert* v. *Richmond,* 327 U. S. 416 (1946); *Memphis Steam Laundry* v. *Stone,* 342 U. S. 389 (1952); *West Point Grocery* v. *Opelika,* 354 U. S. 390 (1957); *Halliburton Oil Well Co.* v. *Reily,* 373 U. S. 64 (1963).

[21] Maryland argued in this Court that appellee, a Virginia corporation, cannot claim the protection of the Fourteenth Amendment, which prohibits a State's denial of equal protection to persons "within its jurisdiction." Maryland relies upon *Blake* v. *McClung,* 172 U. S. 239 (1898), where a Virginia corporation was held unprotected by the Equal Protection Clause against a Tennessee statute that subordinated its claims as a creditor to those of Tennessee corporations. But the situation here differs significantly from *McClung.* The Court in that case noted that the Virginia corporation was not

supports this holding by contending that no difference between the operations of foreign and domestic processors justifies denying to the former the right to use indemnity agreements, and that this discriminatory denial furthers no legitimate state purpose. Maryland, having licensed out-of-state processors, does not justify the amendment's distinction on the basis of any difference in the manner of operation. But Maryland does insist that several state interests are served by it. We agree with Maryland with respect to its primary justification for the 1974 amendment, and thus find it unnecessary to consider other interests that also may be furthered.

Maryland argues that the distinction between domestic and foreign processors in the 1974 amendment is related to the basic statutory purpose of clearing Maryland's landscape of abandoned automobiles. Underlying this argument are the complementary assumptions that hulks delivered to Maryland processors are likely to have been abandoned in Maryland, and those delivered to non-Maryland processors are likely to have been abandoned outside Maryland. Based upon those assumptions, the

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"doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents." *Id.*, at 261. Appellee, however, paid a fee to become licensed under Maryland law, maintains an office in Maryland as required by Maryland regulation, and has been found by the District Court to be subject to the jurisdiction of Maryland courts under the State's "long arm" statute. Although appellee carries on no active business inside Maryland (all vehicles are brought by others to its plant in Virginia), it is "within [Maryland's] jurisdiction" at least for the purposes of this licensing and bounty program. We think this entitles appellee to claim Fourteenth Amendment protection with respect to that program. Cf. *WHYY* v. *Glassboro*, 393 U. S. 117, 119 (1968); *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 571–572 (1949).

State contends that the 1974 amendment, by making it easy for an in-state processor to receive bounties but difficult for an out-of-state processor to do so, tends to ensure that the State's limited resources are targeted to hulks abandoned inside Maryland as opposed to some contiguous State.

The District Court rejected this argument with the observation that Maryland had "not proffered a scintilla of factual support for [its] assumption that nonresident processors are more likely than in-state processors to claim bounties for vehicles abandoned outside of Maryland." 391 F. Supp., at 57. The District Court demanded too much. Maryland's underlying assumptions certainly are not irrational: in terms of likelihood, the Maryland Legislature reasonably could assume that a hulk destroyed by a non-Maryland processor is more likely to have been abandoned outside Maryland than is a hulk destroyed by a Maryland processor, and vice versa. The State is not compelled to verify logical assumptions with statistical evidence.[22]

Appellee contends that the alleged relationship of the amendment to the statutory purpose is belied by a "loophole" in the statute that remains even after the amendment. This "loophole" results from the fact that the statute conditions the payment of bounty upon previous titling of a vehicle in Maryland, rather than upon proof of its abandonment in that State. Thus, even after the 1974 amendment an in-state processor remains free to

[22] As noted earlier, n. 12, *supra*, licensed wreckers use primarily Wrecker's Certificates when delivering hulks to processors. The 1974 amendment did not affect the ability of foreign processors to claim bounties on an equal footing with domestic processors by submitting such certificates. That was consistent with Maryland's effort to reduce the amount of bounty payments for hulks that had rested in some other State: since all licensed wreckers are inside Maryland, see supra, at 796–797, 799, hulks delivered with certificates always will have been eyesores in Maryland junkyards.

recover bounties on hulks previously titled in Maryland but delivered to it after abandonment elsewhere. A more discriminating effort to achieve the statutory purposes, according to appellee, would have changed the statute to condition the bounty upon proof of abandonment in Maryland.[23]

It is well established, however, that a statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional. See *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1966).

Moreover, the statute in its present form still allows payment of bounty on a hulk to a non-Maryland processor upon proper documentation of title. The logic in support of the 1974 amendment—that Maryland processors are more likely than out-of-state processors to

[23] In fact, appellee argues that the statute as it now stands, conditioning payment of bounties only upon previous Maryland titling, manifests no policy to restrict the payment of bounties to vehicles abandoned in Maryland. This comes close to an argument that this intricate statutory scheme was instituted not for the purpose of clearing Maryland's environment of abandoned vehicles, but for the purpose of destroying Maryland titled hulks wherever they might be found—even if it happened to be Virginia or Pennsylvania. Appellee's argument is especially unpersuasive in light of the legislative history of this statute which appellee itself discussed in its brief. That history shows beyond question Maryland's purpose to use the bounty to clear its own streets, lots, and junkyards of abandoned vehicles. That the bounty is conditioned upon previous Maryland titling, rather than proof of abandonment in Maryland, is probably a decision made in the interest of administrative convenience. Determining the place of abandonment would present problems of proof as well as invite fraudulent claims.

destroy hulks abandoned inside the State—suggests the rationality of Maryland's discontinuing bounties to out-of-state processors altogether. If Maryland could do that, we are not prepared to say that it is forbidden to go part of the way by an amendment that has the practical effect, through the distinction as to documentation of title, of substantially curtailing bounty payments to out-of-state processors.[24]

Few would contend that Maryland has taken the straightest road to its goal, either in its original drafting of the statute or in the refinement introduced by the 1974 amendment. But in the area in which this bounty scheme operates the Equal Protection Clause does not demand a surveyor's precision. The 1974 amendment bears a rational relationship to Maryland's purpose of using its limited funds to clean up its own environment, and that is all the Constitution requires. See *Dandridge* v. *Williams*, 397 U. S. 471, 486-487 (1970); *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 44 (1973); *McGinnis* v. *Royster*, 410 U. S. 263, 270, 276-277 (1973).

We hold that the District Court erred in finding the 1974 amendment invalid under either the Commerce Clause or the Equal Protection Clause. Accordingly, its judgment is reversed.

So ordered.

MR. JUSTICE STEVENS, concurring.

The dissent creates the impression that the Court's opinion, which I join without reservation, represents a significant retreat from its settled practice in adjudicat-

[24] It is worth emphasizing that appellee and other out-of-state processors are subject to Maryland licensing, with its annual fee requirements and other nominal burdens, only if they choose to participate in the bounty. If they feel their benefits from such participation after the 1974 amendment do not merit the expense, they are free to withdraw entirely.

ing claims that a state program places an unconstitutional burden on interstate commerce. This is not the fact. There is no prior decision of this Court even addressing the critical Commerce Clause issue presented by this case.

It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. Our cases finding that a state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market. This case is unique because the commerce which Maryland has "burdened" is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile scrap-processing business.

By artificially enhancing the value of certain abandoned hulks, Maryland created a market that did not previously exist.* The program which Maryland initiated in 1969 included subsidies for scrapping plants located in Virginia and Pennsylvania as well as for plants located in Maryland. Those subsidies stimulated the movement of abandoned hulks from Maryland to out-of-state scrapping plants and thereby gave rise to the interstate commerce which is at stake in this litigation.

That commerce, which is now said to be burdened, would never have existed if in the first instance Maryland had decided to confine its subsidy to operators of Maryland plants. A failure to create that commerce would have been unobjectionable because the Commerce Clause surely does not impose on the States any obliga-

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*It might be more accurate to state that Maryland substantially enlarged the market that was previously too small to be significant. But the analysis is the same whether we are dealing with the newly created portion of a pre-existing market or with an entirely new market.

tion to subsidize out-of-state business. Nor, in my judgment, does that Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a "burden" on commerce. Accordingly, the program in effect in Maryland since 1974 could hardly have been challenged if it had been adopted in 1969.

Since Maryland did subsidize Virginia and Pennsylvania plants from 1969 to 1974, it is easy to describe the elimination of the out-of-state subsidy as a burden on interstate commerce. Indeed, we may assume that the temporarily subsidized interstate business has now been totally eliminated. It does not follow, however, that such a "burden" is impermissible.

Unquestionably Maryland could terminate its entire program, discontinuing subsidy payments to Maryland operators as well as out-of-state firms, without offending the Constitution. Since, by hypothesis, we are dealing with a business that is dependent on the availability of subsidy payments, such a complete termination of Maryland's program would have precisely the same effect on the out-of-state plants as the partial termination effected in 1974. The "burden" on the Virginia processor is caused by the nonreceipt of the subsidy, regardless of whether or not Maryland elects to continue to subsidize its local plants. It follows, I believe, that the constitutional issue presented by the 1974 amendment is the same as the question which would have arisen if Maryland had never made the subsidy available to out-of-state concerns.

This is the first case in which any litigant has asked a federal court to address the question whether a state

subsidy constitutes a "burden" on interstate commerce. That fact is significant because there must have been countless situations during the past two centuries in which the several States have experimented with different methods of encouraging local enterprise without providing like encouragement to out-of-state competitors. The absence of any previous challenge to such programs reflects, I believe, a common and correct interpretation of the Commerce Clause as primarily intended (at least when Congress has not spoken) to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide the basis for questioning a State's right to experiment with different incentives to business. The District Court's novel interpretation of the "burden" concept represented a departure which, had it been accepted, would impair rather than protect interstate commerce.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

The Court continues its reinterpretation of the Commerce Clause and its repudiation of established principles guiding judicial analysis thereunder—in this case shifting its focus from congressional power arising under the Commerce Clause, see *National League of Cities* v. *Usery*, *post*, p. 833, to the role of this Court in considering the constitutionality of state action claimed impermissibly to burden interstate commerce. Principles of legal analysis heretofore employed in our cases considering claims under the Commerce Clause, *e. g.*, *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (1938); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761 (1945); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525 (1949); *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520

(1959); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970); *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976), are ignored,[1] and an area of state action plainly burdening interstate commerce, an area not easily susceptible of principled limitation, is judicially carved out and summarily labeled as not "the kind of action with which the Commerce Clause is concerned." Ante, at 805. I cannot agree that well-established principles for analyzing claims arising under the Commerce Clause are inapplicable merely because of the "kind of [state] action" involved, or that it is defensible that legal analysis should cease, irrespective of the impact on commerce or the other facts and circumstances of the case, merely because the Court somehow categorically determines that the instant case involves "a burden which the Commerce Clause was [not] intended to make suspect." *Ante*, at 807.[2] In my view, "[e]very case determining whether or not a local regulation amounts to a prohibited 'burden' on interstate commerce belongs at some point along a graduated scale." *H. P. Hood & Sons, Inc.* v. *Du Mond*, *supra*, at 568 n. 2 (Frankfurter, J., dissenting). Therefore, I am "constrained to dissent because I cannot agree

[1] "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945).

[2] Heretofore, adjudication under the Commerce Clause has invoked a sensitive judicial scrutiny, entailing "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce." *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (1927) (Stone, J., dissenting). See *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366, 371 (1976).

in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes." *Id.*, at 564.

I

I note that appellants do not claim and the Court does not and could not find that the market for scrap metal—including its processing—is not interstate commerce. In addition, there is no claim by appellee that Maryland, if it wishes to run a bounty program to achieve its environmental objectives, must pay a bounty on all scrap hulks irrespective of their State of origin as abandoned vehicles. Plainly Maryland pursuant to its environmental program may "artificially enhance" the price of only those hulks originating as abandoned vehicles within its boundaries. The only questions respecting the Commerce Clause concern the issue of whether Maryland may in effect require that the processing of such scrap, an aspect of its program not obviously related in the first instance to its environmental objectives, be restricted to processors located within the State in light of the asserted governmental objectives in so doing and the consequent effect upon interstate commerce.

However, I cannot agree with the Court that this case is solely to be analyzed in terms of Maryland's "purchase" of items of interstate commerce and its restriction of such "purchases" to items processed in its own State. The result of this single-minded concept of the issues presented is that the Court in my view not only erroneously decides a weighty constitutional question not previously directly addressed by this Court, but also that it ignores another and equally pressing issue under the Commerce Clause.

II

I first address the question that the Court answers: the question whether a State may restrict its purchases

of items of interstate commerce to items produced, manufactured, or processed within its own boundaries. When a State so restricts purchases for its own use, it does not affect the total flow of interstate commerce, but rather precludes only that quantum that would otherwise occur if the State were to behave as a private and disinterested purchaser. Nevertheless, it cannot be gainsaid that a State's refusal for purposes of economic protectionism to purchase for end use items produced elsewhere is a facial and obvious "discrimination against interstate commerce" that we have often said "[t]he commerce clause, by its own force, prohibits . . . , whatever its form or method." *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S., at 185. See *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 535; *Best & Co.* v. *Maxwell*, 311 U. S. 454, 455–456 (1940); *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596 (1923). Clearly the "aim and effect" of such a discrimination is "establishing an economic barrier against competition with the products of another state or the labor of its residents," *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935). Certainly the Court's naked assertion today that "[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others," *ante*, at 810, stands in stark contrast to our "repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *H. P. Hood & Sons, Inc.* v. *Du Mond*, *supra*, at 532.

Moreover, the particular form of discrimination arising when the State restricts its purchases for use to items produced in its own State is of a kind particularly suspect under our precedents, as it is aimed directly at re-

quiring the relocation of labor and industry within the bounds of the State, thus tending "to neutralize advantages belonging to" other States, *Baldwin* v. *G. A. F. Seelig, Inc., supra,* at 527; *Halliburton Oil Well Co.* v. *Reily,* 373 U. S. 64, 72 (1963), and forcing "an artificial rigidity on the economic pattern of the industry." *Toomer* v. *Witsell,* 334 U. S. 385, 404 (1948). See *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1 (1928). We have "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. *Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually* per se *illegal.*" *Pike* v. *Bruce Church, Inc.,* 397 U. S., at 145 (emphasis supplied). And we have never held protection of a State's own citizens from the burden of economic competition with citizens of other States to be such a "clearly legitimate local interest." See, *e. g., H. P. Hood & Sons, Inc., supra; Baldwin* v. *G. A. F. Seelig, Inc., supra.* Patently, so to hold "would be to eat up the rule under the guise of an exception." 294 U. S., at 523.

It is true, as the Court notes, that we have not previously directly addressed the question whether, when a State enters the market as purchaser for end use of items in interstate commerce, it may "[restrict] its trade to its own citizens or businesses within the State." *Ante,* at 808.[3] The novelty of the question, however, does not

[3] The Court has, however, summarily affirmed a lower court ruling to this effect, which distinguished state purchases in a "proprietary" capacity of goods for its own use from other state burdens imposed on interstate commerce. *American Yearbook Co.* v. *Askew,* 339 F. Supp. 719 (MD Fla.), summarily aff'd, 409 U. S. 904 (1972) (BRENNAN and WHITE, JJ., voting to note probable jurisdiction).

The Court has said in other contexts that "[l]ike private individuals and businesses, the Government enjoys the unrestricted

justify the Court's conclusory assertion, without analysis employing established constitutional principles or policies, that "[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others." *Ante*, at 810. Certainly the Court does not attempt to tell us the source of any such "right."[4] Others have argued that the barriers to interstate commerce imposed by restrictive state purchasing policies are already of great significance, Melder, The

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power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127 (1940). See also *Heim* v. *McCall*, 239 U. S. 175, 191–192 (1915); *Atkin* v. *Kansas*, 191 U.S. 207, 222–223 (1903). None of these cases involved challenges to restrictive state purchasing statutes under the Commerce Clause. Cf. *Field* v. *Barber Asphalt Co.*, 194 U. S. 618 (1904), which upheld in the face of a Commerce Clause challenge local governmental contracts that mandated the purchase of out-of-state materials.

[4] The absence of any articulated principle justifying this summary conclusion leads me to infer that the newly announced "state sovereignty" doctrine of *National League of Cities* v. *Usery*, *post*, p. 833, is also the motivating rationale behind this holding. It is true that the Court disclaims any conclusion today respecting congressional power to legislate in this area, *ante*, at 810 n. 19, and I hope that is so. I confess a logical difficulty, however, in understanding why, if the instant state action is not "the kind of action with which the Commerce Clause is concerned," *ante*, at 805, there can be any congressional power to legislate in this area. This exposes one of the difficulties with the Court's categorical approach to today's decision, which simply carves out an area of state action to which it declares the Commerce Clause has no application, rather than employing heretofore accepted principles of analysis looking to the state interest asserted, the impact on interstate commerce flowing from the challenged action, and the availability of reasonable and nondiscriminatory methods for achieving the state interest, and concluding with a reasoned and considered judgment under all the circumstances of the permissibility of the action.

Economics of Trade Barriers, 16 Ind. L. J. 127, 139–141 (1940), and other courts have refused, "in the light of the expanding proprietary activities of the states," invitations to forgo all Commerce Clause analysis merely because the State is acting in a proprietary purchasing capacity in implementing its discriminatory policies. *Garden State Dairies of Vineland, Inc.* v. *Sills*, 46 N. J. 349, 358, 217 A. 2d 126, 130 (1966). See also Recent Cases, 80 Harv. L. Rev. 1357, 1360–1361 (1967).

I would hold, consistent with accepted Commerce Clause principles, that state statutes that facially or in practical effect restrict state purchases of items in interstate commerce to those produced within the State are invalid unless justified by asserted state interests—other than economic protectionism—in regulating matters of local concern for which "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are [not] available." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951). See *Great A&P Tea Co.* v. *Cottrell*, 424 U. S., at 373; *Pike* v. *Bruce Church, Inc., supra*, at 142; *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361, 375 n. 9 (1964); *Baldwin* v. *G. A. F. Seelig, Inc., supra*, at 524.[5]

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[5] In *Pike* v. *Bruce Church, Inc.*, although we stated that "statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere" are burdens on commerce "virtually *per se* illegal," 397 U. S., at 145, we recognized that such an effect as "an incidental consequence of a regulatory scheme could perhaps be tolerated" if necessary to achieve substantial state interests in regulating matters of local concern. *Id.*, at 146. Accordingly, even in this area of effect on interstate commerce we recognized the need for our traditional balancing approach to Commerce Clause analysis, *id.*, at 142, rather than the absolutist approach employed by the Court today.

For my conclusions respecting whether the instant statutory discrimination may be justified under accepted Commerce Clause principles, see *infra*, Part IV.

III

Second, the Court's insistence on viewing this case as qualitatively different under the Commerce Clause merely because the State is in some sense acting as a "purchaser" of the affected items of commerce leads it completely to forgo analysis of another equally vital question. For even those courts and commentators that have concluded that facially restrictive state purchasing statutes are permissible under the Commerce Clause, *e. g.*, *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (MD Fla.), summarily aff'd, 409 U. S. 904 (1972); McAllister, Court, Congress and Trade Barriers, 16 Ind. L. J. 144, 164–165 (1940), have restricted this conclusion to instances where the State in a "proprietary" capacity is purchasing items of commerce for end use, and have distinguished other modes of regulation burdening interstate commerce. But it is clear that Maryland in the instant case is not "purchasing" scrap processing for end use; rather, by in effect requiring "price enhanced" hulks to be processed within the State of Maryland, it is affecting one link in the chain of interstate commerce for scrap metal, a line of commerce that originates prior to Maryland's regulation and continues long past that point. Even if, as the Court concludes, state economic protectionism in "purchasing" items of interstate commerce is not a suspect motive under the Commerce Clause, analysis in this case cannot cease at that point, for by the instant regulation Maryland is allegedly affecting a larger area of commerce by diverting processing of scrap metal in interstate commerce to within its own boundaries.[6]

[6] When the State simply refuses to purchase for its own use items that have been processed out of State, the impact on interstate commerce may be crudely measured by multiplying the value added in processing times the number of items the State purchases. In this

The Court's only apparent reference to this impact on the larger area of commerce in scrap metal is that "Maryland has not *sought* to prohibit the flow of hulks,

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case, however, the impact on commerce is not so restricted; the State in effect not only requires that the value added by processing in respect to the State's environmental objectives—presumptively the amount of the bounty paid which is retained by the processors, a small amount since the record shows that processors customarily pass the largest portion of the bounty on to the scrap haulers—be added within the State, but also that the entire addition of value, including that occurring in response to market demand for scrap metal *qua* metal, be done within the State. In other words, by this mode of regulation, as opposed to what occurs by virtue of restrictions on proprietary purchases for the State's own use, Maryland is in effect diverting processing to locations within its borders of both that element of value that it "purchases," *and* that arising in response to interstate demand for scrap metal that it does not "purchase."

The concurring opinion asserts that "by hypothesis," a hypothesis unsupported in the record, see *infra*, at 831, and n. 8, "we are dealing with a business that is dependent on the availability of subsidy payments," "[t]hat [the] commerce, which is now said to be burdened, would never have existed if in the first instance Maryland had decided to confine its subsidy to operators of Maryland plants," and that the " 'burden' on the Virginia processor is caused by the nonreceipt of the subsidy, regardless of whether or not Maryland elects to continue to subsidize its local plants." *Ante*, at 815, 816. With all respect, however, the evidence and legal arguments are to the contrary. An uncontradicted affidavit in the record reveals that $14 of the $16 "subsidy" is customarily passed on to the scrap hauler, App. 79A, and the inability of the out-of-state processor to pass this subsidy on to the haulers, rather than simply the lack of subsidization of scrap processing itself, is alleged to burden interstate commerce by diverting scrap processing to Maryland.

The complaint alleges that "[a] substantial portion of the Plaintiff's business consists of the destruction and processing of vehicles acquired in interstate commerce from towers and other third persons in Maryland"; that the challenged amendment "enabl[es] Maryland scrap processors to provide financial inducements to [towers] while depriving the plaintiff of the ability to provide [the] same"; that "[i]n consequence . . . the plaintiff is placed at a

or to regulate the conditions under which it may occur." *Ante*, at 806 (emphasis supplied). This conclusion is arguable at best,[7] and our cases establish that "[o]ne challenging the validity of a state enactment" on Com-

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severe competitive and economic disadvantage with Maryland scrap processors because of the arbitrary diversion of [hulks] away from the normal channels of interstate commerce"; and that appellee has been "depriv[ed] . . . of a vital source of scrap, iron, steel and nonferrous scrap which normally moved in interstate commerce." *Id.*, at 10A–11A.

The stipulated facts establish that the "market value of . . . hulks is heavily dependent upon the prices steel mills are willing to pay for . . . scrap [metal], which in turn is influenced by national and international economic conditions," and that "[t]he result is relatively fierce competition by scrap processors for the acquisition of the available . . . hulks." *Id.*, at 59A.

An uncontradicted affidavit in the record asserts that "[t]he lifeblood of the scrap metal processing industry is old cars," that "[t]he primary source of Plaintiff's raw materials is trade in . . . hulks," and that "[a] very substantial portion of the Plaintiff's trade in old cars is derived from Maryland." *Id.*, at 74A–75A. "The ability to acquire eight year old or older [hulks] from Maryland . . . is of crucial importance to the conduct of the Plaintiff's business," *id.*, at 78A, and the market response to the challenged amendment which disabled appellee from passing the bounty on to the haulers "was an almost total abandonment of Plaintiff by its former regular [haulers participating in the bounty program]." "[I]n times of scarcity of old cars when both the offering price is high and the competition [among scrap processors] for the available cars is sharpest, the ability to [pass the bounty on to the scrap haulers] which is, in effect, an offer of a higher price without increasing the cost of the raw material to the processor, imparts a distinct competitive edge to those processors fully able to participate in the bounty program." *Id.*, at 82A–83A.

[7] The preamble to the Act amending the method by which scrap processors may obtain title sufficient for participation in the bounty program and limiting the only practical method to scrap processors located within the State declares that the Act is "[f]or the purpose of protecting *certain* scrap processors who destroy certain abandoned motor vehicles . . . ." *Id.*, at 15A (emphasis in original).

merce Clause grounds is not bound by the State's "declarations of purpose" and may show that the purported objective "is a feigned and not the real purpose." *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S., at 10. See also *Toomer* v. *Witsell,* 334 U. S. 385 (1948); *Buck* v. *Kuykendall,* 267 U. S. 307, 315–316 (1925). More importantly, regardless of the purity of the State's motives or intent with respect to burdening interstate commerce, analysis does not cease at that point for " 'a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' " *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S., at 522; see *Best & Co.* v. *Maxwell,* 311 U. S., at 455–456. "A different view . . . would mean that the Commerce Clause of itself imposes no limitations on state action . . . , save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *Madison,* 340 U. S., at 354.

Rather, once a legitimate state regulation of an object of local concern is found to burden interstate commerce, "this states the beginning of a problem in constitutional law; it does not give the answer." *Bode* v. *Barrett,* 344 U. S. 583, 589 (1953) (Frankfurter, J., dissenting). Established principles dictate that in such a situation analysis proceed as follows:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be pro-

moted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 142.

Mr. Justice Frankfurter, universally recognized to be among the foremost students and judicial practitioners of the jurisprudence of the Commerce Clause, has said:

> "The Willson decision [*Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245 (1829)] begins a wholesome emphasis upon the concrete elements of the situation that concerns both state and national interests. The particularities of a local statute touch its special aims and the scope of their fulfillment, the difficulties which it seeks to adjust, the price at which it does so. These and kindred practical considerations, in their myriad manifestations, have weighed with the Court in determining the fate of state legislation impinging on the activities of national commerce, ever since Marshall in the *Willson* case set the standard for deciding such controversies 'under all the circumstances of the case.' . . . In the history of the Supreme Court no single quality more differentiates judges than the acuteness of their realization that practical considerations, however screened by doctrine, underlie resolution of conflicts between state and national power." F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 33–34 (1937).

The Court today fails that test in my view by mechanically concluding that Maryland's action is not "the kind of action with which the Commerce Clause is concerned," *ante*, at 805, merely because the State is in some sense acting as a "purchaser" of items in interstate commerce. In the absence of some limiting principle, this is a disturbing conclusion, for little imagination is required to

foresee future state actions "set[ting] barrier[s] to traffic between one state and another as effective as if customs duties . . . had been laid upon the thing transported," *Baldwin* v. *G. A. F. Seelig, Inc., supra,* at 521. This can surely occur if all state action is to be immunized from further analysis merely because the design of the regulatory scheme is to "artificially enhance" the price of goods produced within its State by the State's becoming in some sense a "purchaser" of such goods at a point in the total line of commerce short of end purchaser.

It may well be, as developed in Part IV, *infra,* that there are limiting principles in the circumstances of this case because, by means of its policy restricting the location of scrap processing, Maryland is truly regulating matters of local concern respecting its environment and there is as a practical matter an absence of "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests." *Dean Milk Co.* v. *Madison, supra,* at 354. But the Court fails to search for such limiting circumstances and shuts off analysis merely because of the form of the state regulation, thus effectively "immun[izing]" state "statutes . . . requiring that certain kinds of processing be done in the home State before shipment to a sister State," *Pike* v. *Bruce Church, Inc., supra,* at 141, so long as the mode of regulation may be characterized as the State functioning as a "purchaser." Clearly, if the States are to be absolutely unrestrained in their regulation of interstate markets so long as they use methods that may fairly be characterized as "purchasing" items by "artificially enhancing" the price, then the door is open for the States to " 'set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.' " *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U. S., at 377.

IV

Maryland argues that its effective preclusion of out-of-state scrap processors from the relevant portion of the bounty program is required in order to help ensure that bounty payments are limited to hulks abandoned within Maryland and that its public funds are not used in effect to aid in the clearance of hulks abandoned in other States. Certainly this asserted interest is a legitimate object of local concern, and since *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245 (1829), we have "recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S., at 767; see *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443–444 (1960). But the mere assertion of a legitimate local interest being served by the challenged regulation does not end the matter, for there exists an "infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan, supra*, at 768–769. In resolving such questions in close cases, the Court is necessarily involved in "differences of degree [resolution of which] depend[s] on slight differences of fact." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 572 (Frankfurter, J., dissenting); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan, supra*, at 796 (Douglas, J., dissenting), and an adequate record containing the "relevant factual material which will 'afford a sure basis' for an informed judgment" is required.

Id., at 770 (Court's opinion). Such a record is lacking in the instant case.

This case comes to us in a summary judgment posture, and, respecting the impact of the state regulation on the larger area of interstate commerce, the record as the Court notes "contains no details of the hulk [processing] market prior to the bounty scheme." *Ante*, at 809 n. 18.[8] Similarly, respecting the State's justification for the preclusion of out-of-state processors—ensuring that bounties are not paid for hulks originating out of State—the record, as the Court also notes but only in the equal protection context, contains no evidence of whether this objective is in fact achieved by the challenged action or in what degree. Nor is the record developed in regard to the availability of "reasonable nondiscriminatory alternatives, adequate to conserve [this] legitimate local [interest]." *Dean Milk Co.* v. *Madison*, 340 U. S., at 354. The only evidence in the record is speculative at best, revealing that neither the statute nor administrative regulations promulgated thereunder limit bounty payments to hulks originating in Maryland or protect against hulks originating out of State from being processed by in-state processors under the bounty program. Nevertheless, an adequately developed factual record might well inform a judgment that the simple preclusion of out-of-state processors, in light of transportation costs to scrap haulers when they haul Maryland hulks to out-of-state processors, is as reasonable and inexpensive a

[8] The concurring opinion asserts that the interstate market in processing scrap metal allegedly burdened by Maryland's bounty scheme as amended "was previously too small to be significant." *Ante*, at 815 n. Nothing in the record supports this factual judgment, as appellants themselves argue, Brief for Appellants 37–39; Reply Brief for Appellants 2–3, and as the Court below noted, 391 F. Supp. 46, 62 (1975).

means of ensuring that bounty payments are not made for hulks originating out of State as is available to the State under all the circumstances. Accordingly, I would vacate the judgment below and remand for the development of a record adequate to inform a reasonable judgment on these factual issues. *Florida Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 136–137 (1963); *H. P. Hood & Sons, Inc.* v. *Du Mond, supra,* at 574 (Frankfurter, J., dissenting).

Syllabus

NATIONAL LEAGUE OF CITIES ET AL. *v.* USERY, SECRETARY OF LABOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 74–878. Argued April 16, 1975—Reargued March 2, 1976—Decided June 24, 1976*

The Fair Labor Standards Act was amended in 1974 so as to extend the Act's minimum wage and maximum hour provisions to almost all employees of States and their political subdivisions. Appellants (including a number of cities and States) in these cases brought an action against appellee Secretary of Labor challenging the validity of these 1974 amendments and seeking declaratory and injunctive relief. A three-judge District Court dismissed the complaint for failure to state a claim upon which relief might be granted. *Held:*

1. Insofar as the 1974 amendments operate directly to displace the States' abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention, police protection, sanitation, public health, and parks and recreation, they are not within the authority granted Congress by the Commerce Clause. In attempting to exercise its Commerce Clause power to prescribe minimum wages and maximum hours to be paid by the States in their sovereign capacities, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system," *Fry* v. *United States*, 421 U. S. 542, 547 n. 7, and this exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. Pp. 840–852.

2. Congress may not exercise its power to regulate commerce so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. *Fry* v. *United States*, *supra*, distinguished; *Maryland* v. *Wirtz*, 392 U. S. 183, overruled. Pp. 852–855.

406 F. Supp. 826, reversed and remanded.

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*Together with No. 74–879, *California* v. *Usery, Secretary of Labor*, also on appeal from the same court.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 856. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 856. STEVENS, J., filed a dissenting opinion, *post*, p. 880.

Charles S. Rhyne and *Calvin L. Rampton* argued the cause for appellants in both cases on reargument. *Mr. Rhyne* argued the cause for appellants in No. 74–878, and *Talmadge R. Jones*, Deputy Attorney General of California, argued the cause for appellant in No. 74–879 on the original argument. With *Mr. Rhyne* on the briefs in the original argument were *Milton H. Sitton, Alan Davidson, Richard Gebelein*, State Solicitor of Delaware, and the Attorneys General for their respective States as follows: *Bruce E. Babbitt* of Arizona, *Theodore L. Sendak* of Indiana, *Richard C. Turner* of Iowa, *Francis B. Burch* of Maryland, *Francis X. Bellotti* of Massachusetts, *A. F. Summer* of Mississippi, *John C. Danforth* of Missouri, *Robert L. Woodahl* of Montana, *Paul L. Douglas* of Nebraska, *Robert List* of Nevada, *Warren B. Rudman* of New Hampshire, *Larry D. Derryberry* of Oklahoma, *R. Lee Johnson* of Oregon, *Daniel R. McLeod* of South Carolina, *William Janklow* of South Dakota, *John L. Hill* of Texas, *Vernon B. Romney* of Utah, and *David B. Kennedy* of Wyoming. With *Mr. Jones* on the brief in the original argument were *Evelle J. Younger*, Attorney General of California, and *Willard A. Shank*, Assistant Attorney General. With *Mr. Rhyne* on the brief on reargument in both cases were all of the above-named counsel. *Francis B. Burch*, Attorney General of Maryland, *Henry R. Lord*, Deputy Attorney General, and *Glenn E. Bushel*, Assistant Attorney General, filed a brief for appellant in No. 74–878.

Solicitor General Bork reargued the cause for appellee in both cases. With him on the briefs on reargu-

ment was *Jacob I. Karro.* With him on the brief on the original argument were *Allan Abbot Tuttle* and *Mr. Karro.*†

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act,[1] and required employers covered by the Act to pay their employees a minimum hourly wage [2] and to pay them at one and one-half times their regular

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†Briefs of *amici curiae* urging reversal were filed by *Andrew P. Miller,* Attorney General of Virginia, *Anthony F. Troy,* Deputy Attorney General, *D. Patrick Lacy, Jr.,* Assistant Attorney General, *Louis J. Lefkowitz,* Attorney General of New York, and *C. Flippo Hicks* for the Commonwealth of Virginia et al.; by *Aloysius J. Suchy, P. Eugene Price, Jr., William F. Edwards, Norman A. Palermo, F. Lee Ruck,* and *David E. Engdahl* for the National Association of Counties et al.; and by *Eugene N. Collins, Conard B. Mattox, Jr., Thomas Emmet Walsh, Henry W. Underhill, Jr., N. Alex Bickley, Samuel Gorlick, Aaron A. Wilson, John Dekker, James B. Brennan, W. Bernard Richland, William R. Quinlan, S. G. Johndroe, Jr., J. LaMar Shelley,* and *Robert G. Dixon, Jr.,* for the National Institute of Municipal Law Officers; and by *Sylvester Petro* for the Public Service Research Council.

Briefs of *amici curiae* urging affirmance were filed by *William J. Baxley,* Attorney General of Alabama, *John D. MacFarlane,* Attorney General of Colorado, *Frank J. Kelley,* Attorney General of Michigan, and *Warren R. Spannous,* Attorney General of Minnesota, for the State of Alabama et al.; by *Robert E. Nagle* for Harrison A. Williams, Jr., et al.; by *J. Albert Woll, Laurence Gold, Robert H. Chanin,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; by *Mr. Kaufmann* for the Coalition of American Public Employees; by *Jerome K. Tankel* for the International Conference of Police Assns.; and by *Harry Lewis Michaels* for the Florida Police Benevolent Assn.

[1] The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* (1940 ed.).

[2] § 206 (a) (1940 ed.).

rate of pay for hours worked in excess of 40 during a workweek.[3] By this Act covered employers were required to keep certain records to aid in the enforcement of the Act,[4] and to comply with specified child labor standards.[5] This Court unanimously upheld the Act as a valid exercise of congressional authority under the commerce power in *United States* v. *Darby*, 312 U. S. 100 (1941), observing:

> "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Id.*, at 115.

The original Fair Labor Standards Act passed in 1938 specifically excluded the States and their political subdivisions from its coverage.[6] In 1974, however, Congress enacted the most recent of a series of broadening amendments to the Act. By these amendments Congress has extended the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions. Appellants in these cases include individual cities and States, the National League of Cities, and the National Governors' Conference;[7] they brought an action in the District

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[3] § 207 (a)(3) (1940 ed.).

[4] § 211 (c) (1940 ed.).

[5] § 212 (1940 ed.).

[6] Title 29 U. S. C. § 203 (d) (1940 ed.):

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State . . . ."

[7] Appellants in No. 74-878 are the National League of Cities, the National Governors' Conference, the States of Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, and Wyoming, the Metropolitan Government of Nashville and Davidson County,

Court for the District of Columbia which challenged the validity of the 1974 amendments. They asserted in effect that when Congress sought to apply the Fair Labor Standards Act provisions virtually across the board to employees of state and municipal governments it "infringed a constitutional prohibition" running in favor of the States *as States.* The gist of their complaint was not that the conditions of employment of such public employees were beyond the scope of the commerce power had those employees been employed in the private sector but that the established constitutional doctrine of intergovernmental immunity consistently recognized in a long series of our cases affirmatively prevented the exercise of this authority in the manner which Congress chose in the 1974 amendments.

I

In a series of amendments beginning in 1961 Congress began to extend the provisions of the Fair Labor Standards Act to some types of public employees. The 1961 amendments to the Act [8] extended its coverage to persons who were employed in "enterprises" engaged in commerce or in the production of goods for commerce.[9] And in 1966, with the amendment of the definition of employers under the Act, the exemption heretofore extended to the States and their political subdivisions was

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Tenn., and the cities of Cape Girardeau, Mo., Lompoc, Cal., and Salt Lake City, Utah. The appellant in No. 74–879 is the State of California.

In view of the fact that the appellants include sovereign States and their political subdivisions to which application of the 1974 amendments is claimed to be unconstitutional, we need not consider whether the organizational appellants had standing to challenge the Act. See *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 44–45 (1974).

[8] Pub. L. 87–30, 75 Stat. 65.

[9] 29 U. S. C. §§ 203 (r), 203 (s), 206 (b), 207 (a)(2) (1964 ed.).

removed with respect to employees of state hospitals, institutions, and schools.[10] We nevertheless sustained the validity of the combined effect of these two amendments in *Maryland* v. *Wirtz*, 392 U. S. 183 (1968).

In 1974, Congress again broadened the coverage of the Act, 88 Stat. 55. The definition of "employer" in the Act now specifically "includes a public agency," 29 U. S. C. § 203 (d) (1970 ed., Supp. IV). In addition, the critical definition of "[e]nterprise[s] engaged in commerce or in the production of goods for commerce" was expanded to encompass "an activity of a public agency," and goes on to specify that

> "[t]he employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce." 29 U. S. C. § 203 (s)(5) (1970 ed., Supp. IV).

Under the amendments "[p]ublic agency" is in turn defined as including

> "the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency." 29 U. S. C. § 203 (x) (1970 ed., Supp. IV).

By its 1974 amendments, then, Congress has now entirely removed the exemption previously afforded States and their political subdivisions, substituting only the Act's general exemption for executive, administrative, or pro-

[10] 80 Stat. 831, 29 U. S. C. § 203 (d) (1964 ed., Supp. II).

fessional personnel, 29 U. S. C. § 213 (a)(1), which is supplemented by provisions excluding from the Act's coverage those individuals holding public elective office or serving such an officeholder in one of several specific capacities. 29 U. S. C. § 203 (e)(2)(C) (1970 ed., Supp. IV). The Act thus imposes upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees engaged in interstate commerce. These requirements are essentially identical to those imposed upon private employers, although the Act does attempt to make some provision for public employment relationships which are without counterpart in the private sector, such as those presented by fire protection and law enforcement personnel. See 29 U. S. C. § 207 (k) (1970 ed., Supp. IV).

Challenging these 1974 amendments in the District Court, appellants sought both declaratory and injunctive relief against the amendments' application to them, and a three-judge court was accordingly convened pursuant to 28 U. S. C. § 2282. That court, after hearing argument on the law from the parties, granted appellee Secretary of Labor's motion to dismiss the complaint for failure to state a claim upon which relief might be granted. The District Court stated it was "troubled" by appellants' contentions that the amendments would intrude upon the States' performance of essential governmental functions. The court went on to say that it considered their contentions

> "substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of [*Maryland* v. *Wirtz, supra*]; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the Wirtz opinion as it stands." *National League of Cities* v. *Brennan*, 406 F. Supp. 826, 828 (DC 1974).

We noted probable jurisdiction in order to consider the important questions recognized by the District Court. 420 U. S. 906 (1975).[11] We agree with the District Court that the appellants' contentions are substantial. Indeed upon full consideration of the question we have decided that the "far-reaching implications" of *Wirtz* should be overruled, and that the judgment of the District Court must be reversed.

II

It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress. That authority is, in the words of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Id.*, at 196.

When considering the validity of asserted applications of this power to wholly private activity, the Court has made it clear that

> "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." *Fry* v. *United States*, 421 U. S. 542, 547 (1975).

Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, 262 (1964).

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[11] When the cases were not decided in October Term, 1974, they were set down for reargument, 421 U. S. 986 (1975).

Appellants in no way challenge these decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, *United States* v. *Jackson*, 390 U. S. 570 (1968), or the Due Process Clause of the Fifth Amendment, *Leary* v. *United States*, 395 U. S. 6 (1969). Appellants' essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.[12]

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[12] MR. JUSTICE BRENNAN'S dissent intimates, *post*, at 858, that guarantees of individual liberties are the only sort of constitutional restrictions which this Court will enforce as against congressional action. It reasons that "Congress is constituted of representatives in both Senate and House *elected from the States*. . . . Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves." *Post*, at 876. Precisely what is meant by the phrase "are in that sense decisions of the States themselves" is not entirely clear from this language; it is indisputable that a common constituency of voters elects both a State's Governor and its two United States Senators. It is equally indisputable that since the enactment of the Seventeenth Amendment those Senators are not dependent upon state legislators for their election. But in any event the intimation which this reasoning is used to support is incorrect.

In *Myers* v. *United States*, 272 U. S. 52 (1926), the Court held that Congress could not by law limit the authority of the President

This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. In *Wirtz*, for example, the Court took care to assure the appellants that it had "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity,'" which they feared. 392 U. S., at 196. Appellee Secretary in this case, both in his brief and upon oral argument, has agreed that our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power. See, *e. g.*, Brief for Appellee 30–41; Tr. of Oral Arg. 39–43. In *Fry, supra*, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' *United States* v.

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to remove at will an officer of the Executive Branch appointed by him. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the Court held that Congress could not constitutionally require that members of the Federal Elections Commission be appointed by officers of the House of Representatives and of the Senate, and that all such appointments had to be made by the President. In each of these cases, an even stronger argument than that made in the dissent could be made to the effect that since each of these bills had been signed by the President, the very officer who challenged them had consented to their becoming law, and it was therefore no concern of this Court that the law violated the Constitution. Just as the dissent contends that "the States are fully able to protect their own interests . . . ," *post*, at 876, it could have been contended that the President, armed with the mandate of a national constituency and with the veto power, was able to protect *his* own interests. Nonetheless, in both cases the laws were held unconstitutional, because they trenched on the authority of the Executive Branch.

> *Darby*, 312 U. S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U. S., at 547 n. 7.

In *New York* v. *United States*, 326 U. S. 572 (1946), Mr. Chief Justice Stone, speaking for four Members of an eight-Member Court [13] in rejecting the proposition that Congress could impose taxes on the States so long as it did so in a nondiscriminatory manner, observed:

> "A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed." *Id.*, at 587–588.[14]

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[13] In quoting from the separate opinion of Mr. Justice Frankfurter in *New York* v. *United States*, 326 U. S., at 573, MR. JUSTICE BRENNAN fails to add that this opinion attracted only one other adherent. The separate opinion of Mr. Chief Justice Stone, on the other hand, was joined by three other Members of the Court. And the two dissenters advocated a position even more protective of state sovereignty than that advanced by Stone. See *Id.*, at 590–598 (Douglas, J., dissenting).

[14] MR. JUSTICE BRENNAN suggests that "the Chief Justice was addressing not the question of a state sovereignty restraint upon the exercise of the commerce power, but rather the principle of implied immunity of the States and Federal Government from taxation by the other . . . ." *Post*, at 863–864. The asserted distinction, however, escapes us. Surely the federal power to tax is no less a delegated power than is the commerce power: both find their genesis

The expressions in these more recent cases trace back to earlier decisions of this Court recognizing the essential role of the States in our federal system of government. Mr. Chief Justice Chase, perhaps because of the particular time at which he occupied that office, had occasion more than once to speak for the Court on this point. In *Texas* v. *White*, 7 Wall. 700, 725 (1869), he declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." In *Lane County* v. *Oregon*, 7 Wall. 71 (1869), his opinion for the Court said:

> "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized." *Id.*, at 76.

In *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926), the Court likewise observed that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Id.*, at 523.

Appellee Secretary argues that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regu-

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in Art. I, § 8. Nor can characterizing the limitation recognized upon the federal taxing power as an "implied immunity" obscure the fact that this "immunity" is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority.

lation of the private sector, have already curtailed the sovereignty of the States quite as much as the 1974 amendments to the Fair Labor Standards Act. We do not agree. It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. In *Coyle* v. *Oklahoma*, 221 U. S. 559 (1911), the Court gave this example of such an attribute:

> "The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained." *Id.*, at 565.

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are " 'functions essential to separate and independent existence,' " *id.*, at 580, quoting from *Lane County* v. *Oregon*, *supra*, at 76, so that Congress

may not abrogate the States' otherwise plenary authority to make them.

In their complaint appellants advanced estimates of substantial costs which will be imposed upon them by the 1974 amendments. Since the District Court dismissed their complaint, we take its well-pleaded allegations as true, although it appears from appellee's submissions in the District Court and in this Court that resolution of the factual disputes as to the effect of the amendments is not critical to our disposition of the case.

Judged solely in terms of increased costs in dollars, these allegations show a significant impact on the functioning of the governmental bodies involved. The Metropolitan Government of Nashville and Davidson County, Tenn., for example, asserted that the Act will increase its costs of providing essential police and fire protection, without any increase in service or in current salary levels, by $938,000 per year. Cape Girardeau, Mo., estimated that its annual budget for fire protection may have to be increased by anywhere from $250,000 to $400,000 over the current figure of $350,000. The State of Arizona alleged that the annual additional expenditures which will be required if it is to continue to provide essential state services may total $2.5 million. The State of California, which must devote significant portions of its budget to fire-suppression endeavors, estimated that application of the Act to its employment practices will necessitate an increase in its budget of between $8 million and $16 million.

Increased costs are not, of course, the only adverse effects which compliance with the Act will visit upon state and local governments, and in turn upon the citizens who depend upon those governments. In its complaint in intervention, for example, California asserted that it could not comply with the overtime costs (ap-

proximately $750,000 per year) which the Act required to be paid to California Highway Patrol cadets during their academy training program. California reported that it had thus been forced to reduce its academy training program from 2,080 hours to only 960 hours, a compromise undoubtedly of substantial importance to those whose safety and welfare may depend upon the preparedness of the California Highway Patrol.

This type of forced relinquishment of important governmental activities is further reflected in the complaint's allegation that the city of Inglewood, Cal., has been forced to curtail its affirmative action program for providing employment opportunities for men and women interested in a career in law enforcement. The Inglewood police department has abolished a program for police trainees who split their week between on-the-job training and the classroom. The city could not abrogate its contractual obligations to these trainees, and it concluded that compliance with the Act in these circumstances was too financially burdensome to permit continuance of the classroom program. The city of Clovis, Cal., has been put to a similar choice regarding an internship program it was running in cooperation with a California state university. According to the complaint, because the interns' compensation brings them within the purview of the Act the city must decide whether to eliminate the program entirely or to substantially reduce its beneficial aspects by doing away with any pay for the interns.

Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the States *qua* States, requires that they shall pay

all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress. It may well be that as a matter of economic policy it would be desirable that States, just as private employers, comply with these minimum wage requirements. But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment. The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage. It may wish to offer part-time or summer employment to teenagers at a figure less than the minimum wage, and if unable to do so may decline to offer such employment at all. But the Act would forbid such choices by the States. The only "discretion" left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that complement to a number which can be paid the federal minimum wage without increasing revenue.[15]

This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers, who have long been covered by the Act and who must find ways to increase their gross income if they are to pay higher wages while

[15] The complaint recited that a number of appellants were prohibited by their State Constitutions from incurring debts in excess of taxes for the current year. Those Constitutions also impose ceilings upon the percentage rates at which property might be taxed by those governmental units. App. 36–37.

maintaining current earnings. The difference, however, is that a State is not merely a factor in the "shifting economic arrangements" of the private sector of the economy, *Kovacs* v. *Cooper,* 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring), but is itself a coordinate element in the system established by the Framers for governing our Federal Union.

The degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty can be seen even more clearly upon examining the overtime requirements of the Act. The general effect of these provisions is to require the States to pay their employees at premium rates whenever their work exceeds a specified number of hours in a given period. The asserted reason for these provisions is to provide a financial disincentive upon using employees beyond the work period deemed appropriate by Congress. According to appellee:

> "This premium rate can be avoided if the [State] uses other employees to do the overtime work. This, in effect, tends to discourage overtime work and to spread employment, which is the result Congress intended." Brief for Appellee 43.

We do not doubt that this may be a salutary result, and that it has a sufficiently rational relationship to commerce to validate the application of the overtime provisions to private employers. But, like the minimum wage provisions, the vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

This congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs. Although at this point many of the actual effects

under the proposed amendments remain a matter of some dispute among the parties, enough can be satisfactorily anticipated for an outline discussion of their general import. The requirement imposing premium rates upon any employment in excess of what Congress has decided is appropriate for a governmental employee's workweek, for example, appears likely to have the effect of coercing the States to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation. In addition, appellee represents that the Act will require that the premium compensation for overtime worked must be paid in cash, rather than with compensatory time off, unless such compensatory time is taken in the same pay period. Supplemental Brief for Appellee 9–10; see *Dunlop* v. *New Jersey*, 522 F. 2d 504 (CA3 1975), cert. pending *sub nom. New Jersey* v. *Usery*, No. 75–532. This, too, appears likely to be highly disruptive of accepted employment practices in many governmental areas where the demand for a number of employees to perform important jobs for extended periods on short notice can be both unpredictable and critical. Another example of congressional choices displacing those of the States in the area of what are without doubt essential governmental decisions may be found in the practice of using volunteer firemen, a source of manpower crucial to many of our smaller towns' existence. Under the regulations proposed by appellee, whether individuals are indeed "volunteers" rather than "employees" subject to the minimum wage provisions of the Act are questions to be decided in the courts. See Brief for Appellee 49, and n. 41. It goes without saying that provisions such as these contemplate a significant reduction of traditional

volunteer assistance which has been in the past drawn on to complement the operation of many local governmental functions.

Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies. We earlier noted some disagreement between the parties regarding the precise effect the amendments will have in application. We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented, however. For even if we accept appellee's assessments concerning the impact of the amendments, their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.[16] Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "'separate and independent existence.'" *Coyle*, 221 U. S., at 580. Thus, even if appellants may have overestimated the effect which the Act will have upon

[16] These examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments.

209-904 O - 78 - 57

their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system," *Fry*, 421 U. S., at 547 n. 7. This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.[17]

III

One final matter requires our attention. Appellee has vigorously urged that we cannot, consistently with the Court's decisions in *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), and *Fry*, *supra*, rule against him here. It is important to examine this contention so that it will be clear what we hold today, and what we do not.

With regard to *Fry*, we disagree with appellee. There the Court held that the Economic Stabilization Act of 1970 was constitutional as applied to temporarily freeze the wages of state and local government employees. The Court expressly noted that the degree of intrusion upon the protected area of state sovereignty was in that case

[17] We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

even less than that worked by the amendments to the FLSA which were before the Court in *Wirtz*. The Court recognized that the Economic Stabilization Act was "an emergency measure to counter severe inflation that threatened the national economy." 421 U. S., at 548.

We think our holding today quite consistent with *Fry*. The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time. The effect of the across-the-board freeze authorized by that Act, moreover, displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during the period of the emergency. Finally, the Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them. These factors distinguish the statute in *Fry* from the provisions at issue here. The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency. "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New*, 243 U. S. 332, 348 (1917).

With respect to the Court's decision in *Wirtz*, we reach a different conclusion. Both appellee and the District Court thought that decision required rejection of appel-

lants' claims. Appellants, in turn, advance several arguments by which they seek to distinguish the facts before the Court in *Wirtz* from those presented by the 1974 amendments to the Act. There are undoubtedly factual distinctions between the two situations, but in view of the conclusions expressed earlier in this opinion we do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative.

Wirtz relied heavily on the Court's decision in *United States* v. *California*, 297 U. S. 175 (1936). The opinion quotes the following language from that case:

> "'[We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.' 297 U. S., at 185." 392 U. S., at 198.

But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta [18] from

[18] The holding of *United States* v. *California*, as opposed to the language quoted in the text, is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . . ." 297 U. S., at 182.

For the same reasons, despite MR. JUSTICE BRENNAN's claims to the contrary, the holdings in *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), and *California* v. *Taylor*, 353 U. S. 553 (1957), are likewise unimpaired by our decision today. It also seems appropriate to note that *Case* v. *Bowles*, 327 U. S. 92 (1946), has not been overruled as the dissent asserts. Indeed that decision,

United States v. *California,* simply wrong.[19] Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz,* allow "the National Government [to] devour the essentials of state sovereignty," 392 U. S., at 205, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz,* and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens.[20] We are therefore persuaded that *Wirtz* must be overruled.

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upon which our Brother heavily relies, has no direct application to the questions we consider today at all. For there the Court sustained an application of the Emergency Price Control Act to a sale of timber by the State of Washington, expressly noting that the "only question is whether the State's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war." *Id.,* at 102. The Court rejected the State's claim of immunity on the ground that sustaining it would impermissibly "impair a prime purpose of the Federal Government's establishment." *Ibid.* Nothing we say in this opinion addresses the scope of Congress' authority under its war power. Cf. n. 17, *supra.*

[19] MR. JUSTICE BRENNAN's dissent leaves no doubt from its discussion, *post,* at 876–878, that in its view Congress may under its commerce power deal with the States as States just as they might deal with private individuals. We venture to say that it is this conclusion, rather than the one we reach, which is in the words of the dissent a "startling restructuring of our federal system . . . ," *post,* at 875. Even the appellee Secretary, defending the 1974 amendments in this Court, does not take so extreme a position.

[20] As the denomination "political subdivision" implies, the local

The judgment of the District Court is accordingly reversed, and the cases are remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BLACKMUN, concurring.

The Court's opinion and the dissents indicate the importance and significance of this litigation as it bears upon the relationship between the Federal Government and our States. Although I am not untroubled by certain possible implications of the Court's opinion—some of them suggested by the dissents—I do not read the opinion so despairingly as does my Brother BRENNAN. In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. See *ante*, at 852–853. With this understanding on my part of the Court's opinion, I join it.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

The Court concedes, as of course it must, that Congress enacted the 1974 amendments pursuant to its exclusive power under Art. I, § 8, cl. 3, of the Constitution

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governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself.

"[t]o regulate Commerce . . . among the several States." It must therefore be surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process. For 152 years ago Mr. Chief Justice Marshall enunciated that principle to which, until today, his successors on this Court have been faithful.

> "[T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*" *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824) (emphasis added).[1]

Only 34 years ago, *Wickard* v. *Filburn*, 317 U. S. 111, 120 (1942), reaffirmed that "[a]t the beginning Chief Justice Marshall . . . made emphatic the embracing and penetrating nature of [Congress' commerce] power by

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[1] "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people." The Federalist No. 31, p. 195 (J. Cooke ed. 1961) (A. Hamilton).

warning that effective restraints on its exercise must proceed from political rather than from judicial processes."

My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power. Mr. Chief Justice Marshall recognized that limitations "prescribed in the constitution," *Gibbons* v. *Ogden, supra,* at 196, restrain Congress' exercise of the power. See *Parden* v. *Terminal R. Co.,* 377 U. S. 184, 191 (1964); *Katzenbach* v. *McClung,* 379 U. S. 294, 305 (1964); *United States* v. *Darby,* 312 U. S. 100, 114 (1941). Thus laws within the commerce power may not infringe individual liberties protected by the First Amendment, *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178 (1946); the Fifth Amendment, *Leary* v. *United States,* 395 U. S. 6 (1969); or the Sixth Amendment, *United States* v. *Jackson,* 390 U. S. 570 (1968). But there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power.[2]

[2] Some decisions reflect the Court's reluctance to interpret legislation to alter the federal-state balance of power. See, *e. g., Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279, 285–287 (1973); *United States* v. *Bass,* 404 U. S. 336, 349 (1971). Rather than state any limit on congressional power, however, these decisions merely rely on our traditional canon of construction in the face of statutory ambiguity that recognizes a presumption that Congress normally considers effects on federalism before taking action displacing state authority. Stern, The Commerce Clause and the National Economy, 1933–1946, Part Two, 59 Harv. L. Rev. 883, 946 (1946). There is no claim that the 1974 amendments are not clearly intended to apply to the States, nor is there any suggestion that Congress was unaware of the federalism issue.

We said in *United States* v. *California,* 297 U. S. 175, 184 (1936), for example: "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . [T]he power of the state is subordinate to the constitutional exercise of the granted federal power." This but echoed another principle emphasized by Mr. Chief Justice Marshall:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. . . .
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> "The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'any thing in the constitution or laws of any State to the contrary notwithstanding.' " *M'Culloch* v. *Maryland,* 4 Wheat. 316, 405–406 (1819).

"[It] is not a controversy between equals" when the Federal Government "is asserting its sovereign power to regulate commerce . . . . [T]he interests of the nation are more important than those of any State." *Sanitary District* v. *United States,* 266 U. S. 405, 425–426 (1925). The commerce power "is an affirmative power commensurate with the national needs." *North American Co.* v. *SEC,* 327 U. S. 686, 705 (1946). The Constitution reserves to the States "only . . . that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized

exercise of Federal power." *The Minnesota Rate Cases*, 230 U. S. 352, 399 (1913). "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." *In re Rahrer*, 140 U. S. 545, 562 (1891).

My Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent. An abstraction having such profoundly pernicious consequences is not made less so by characterizing the 1974 amendments as legislation directed against the "States *qua* States." *Ante*, at 847. See *ante*, at 845, 854. Of course, regulations that this Court can say are not regulations of "commerce" cannot stand, *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U. S. 453, 466 (1938), and in this sense "[t]he Court has ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'" *Maryland* v. *Wirtz*, 392 U. S. 183, 196 (1968).[3] But my

[3] As support for the creation of a state sovereignty limitation on the commerce power, my Brethren quote this statement in *Wirtz* out of context. *Ante*, at 842. This statement is at the end of a paragraph in *Wirtz* recognizing that Congress' commerce power is limited because it reaches only "'commerce with foreign nations and among the several States.'" 392 U. S., at 196, quoting *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U. S., at 466. The passage that follows the language quoted by the Court is:

"But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U. S., at 196–197.

It is clear, then, that this Court's "ample power" to prevent the destruction of the States was not found in *Wirtz* to result from some affirmative limit on the exercise of the commerce power, but rather in the Court's function of limiting congressional exercise of its power to regulation of "commerce."

Brethren make no claim that the 1974 amendments are not regulations of "commerce"; rather they overrule *Wirtz* in disagreement with historic principles that *United States* v. *California, supra,* reaffirmed: "[W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." *Wirtz, supra,* at 196–197. Clearly, therefore, my Brethren are also repudiating the long line of our precedents holding that a judicial finding that Congress has not unreasonably regulated a subject matter of "commerce" brings to an end the judicial role. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch* v. *Maryland, supra,* at 421.

The reliance of my Brethren upon the Tenth Amendment as "an express declaration of [a state sovereignty] limitation," *ante,* at 842,[4] not only suggests that they

[4] The Court relies on *Fry* v. *United States,* 421 U. S. 542, 547 n. 7 (1975), but I cannot subscribe to reading *Fry* as departing, without analysis, from a principle that has remained unquestioned for over 150 years. Although the Tenth Amendment "is not without significance," *ibid.,* its meaning is clear: it declares that our Federal Government is one of delegated powers. And it is because of this constraint, rather than the state-sovereignty doctrine discovered today by the Court, "that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Ibid. Fry* did not say that there is a limit in the Tenth Amendment on the exercise of a delegated power, but instead said that "Congress may not exercise power in a fashion that . . . ." The only import of the footnote in *Fry,* then,

overrule governing decisions of this Court that address this question but must astound scholars of the Constitution. For not only early decisions, *Gibbons* v. *Ogden*, 9 Wheat., at 196; *M'Culloch* v. *Maryland, supra*, at 404–407; and *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324–325 (1816), hold that nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress. See F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 39–40 (1937). Rather, as the Tenth Amendment's significance was more recently summarized:

> "The amendment states but a truism that all is retained which has not been surrendered. *There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment* or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . . .
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> "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the per-

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is that Congress may not invade state sovereignty by exercising powers not delegated to it by the Constitution; since the wage ceilings at issue in *Fry* were clearly within the commerce power, we found no "drastic invasion of state sovereignty." *Id.*, at 548 n. 7. Even the author of today's opinion stated in *Fry* that the Tenth Amendment does not "by its terms" restrict Congress' power to regulate commerce. *Id.*, at 557 (REHNQUIST, J., dissenting).

mitted end." *United States* v. *Darby*, 312 U. S., at 124 (emphasis added).[5]

My Brethren purport to find support for their novel state-sovereignty doctrine in the concurring opinion of Mr. Chief Justice Stone in *New York* v. *United States*, 326 U. S. 572, 586 (1946). That reliance is plainly misplaced. That case presented the question whether the Constitution either required immunity of New York State's mineral water business from federal taxation or denied to the Federal Government power to lay the tax. The Court sustained the federal tax. Mr. Chief Justice Stone observed in his concurring opinion that "a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.*, at 587. But the Chief Justice was addressing not the question of a state-sovereignty restraint upon the exercise of the commerce power, but rather the principle of implied immunity of the States

[5] In support of the first-quoted paragraph, *Darby* cited 2 J. Elliot, Debates 123, 131 (2d ed. 1787); 3 *id.*, at 450, 464, 600; 4 *id.*, at 140, 148; 1 Annals of Congress 432, 761, 767–768 (1789); 2 J. Story, Commentaries on the Constitution §§ 1907–1908 (2d ed. 1851) ("It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those which are granted").

Decisions expressly rejecting today's interpretation of the Tenth Amendment also include *Sperry* v. *Florida ex rel. Florida Bar*, 373 U. S. 379, 403 (1963); *Oklahoma* v. *CSC*, 330 U. S. 127, 143 (1947); *Case* v. *Bowles*, 327 U. S. 92, 102 (1946); *Fernandez* v. *Wiener*, 326 U. S. 340, 362 (1945); *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U. S. 508, 534 (1941); *United States* v. *Sprague*, 282 U. S. 716, 733–734 (1931).

and Federal Government from taxation by the other: "The counterpart of such undue interference has been recognized since Marshall's day as the implied immunity of each of the dual sovereignties of our constitutional system from taxation by the other." *Ibid.*

In contrast, the apposite decision that Term to the question whether the Constitution implies a state-sovereignty restraint upon congressional exercise of the commerce power is *Case* v. *Bowles,* 327 U. S. 92 (1946). The question there was whether the Emergency Price Control Act could apply to the sale by the State of Washington of timber growing on lands granted by Congress to the State for the support of common schools. The State contended that "there is a doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other' . . . [and] that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.'" *Id.,* at 101. The Court emphatically rejected that argument, in an opinion joined by Mr. Chief Justice Stone, reasoning:

> "Since the Emergency Price Control Act has been sustained as a congressional exercise of the war power, the [State's] argument is that the extent of that power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved. Cf. *United States* v. *California,* . . . 297 U. S. at 183–185." *Ibid.*[6]

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[6] *Case* also expressed concerns about creating a state-sovereignty limitation on a delegated power that are equally applicable to re-

The footnote to this statement rejected the suggested dichotomy between essential and nonessential state governmental functions as having "proved to be unworkable" by referring to "the several opinions in *New York* v. *United States,* 326 U. S. 572." *Id.,* at 101 n. 7. Even more significant for our purposes is the Court's citation of *United States* v. *California,* a case concerned with Congress' power to regulate commerce, as supporting the rejection of the State's contention that state sovereignty is a limitation on Congress' war power. *California* directly presented the question whether any state-sovereignty restraint precluded application of the Federal Safety Appliance Act to a state owned and operated railroad. The State argued "that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, . . . it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act." 297 U. S., at 183. Mr. Justice Stone rejected the contention in an opinion

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strictions on the commerce power: "The result would be that the constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the Federal Government's establishment." 327 U. S., at 102. My Brethren intimate that Congress' war power is more properly viewed as "a prime purpose of the Federal Government's establishment" than the commerce power. *Ante,* at 855 n. 18. Nothing could be further from the fact. "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony' . . . . No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished." *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525, 533–534 (1949); see *id.,* at 532–535.

for a unanimous Court. His rationale is a complete refutation of today's holding:

> "That in operating its railroad [the State] is acting within a power reserved to the states cannot be doubted. . . . The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . .
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> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which [California] relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power . . . which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. . . . Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*" *Id.*, at 183–185 (emphasis added).[7]

[7] Even in the tax area the States' immunity has not gone unchallenged. The separate opinion of Mr. Justice Frankfurter in *New*

Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree.[8] The only analysis even remotely resembling that

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York v. *United States*, 326 U. S. 572, 573 (1946), argued that the only limitation on the federal power to tax was that Congress not discriminate against the States. There is no such discrimination in the 1974 amendments, since they apply to both public and private employers. Mr. Justice Frankfurter noted a distinction between immunities claimed to invalidate state taxes on federal activities and those urged as a basis for rejecting federal taxes. "The federal government is the government of all the States, and all the States share in the legislative process by which a tax of general applicability is laid." *Id.*, at 577. See *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405–406 (1819). He also recognized that immunity in this area had been significantly eroded since it was first used to protect state officials from a federal tax in *Collector* v. *Day*, 11 Wall. 113 (1871). See, *e. g.*, *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939), overruling *Collector* v. *Day*, *supra*; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938); *Fox Film Corp.* v. *Doyal*, 286 U. S. 123 (1932).

Even more significantly, Mr. Justice Frankfurter pointed out that the existence of a state immunity from federal taxation, to the extent that it was based on any vague sovereignty notions, was inconsistent with the holding in *United States* v. *California*, 297 U. S. 175 (1936), that state sovereignty does not restrict federal exercise of the commerce power. 326 U. S., at 582.

[8] My Brethren's reliance on *Texas* v. *White*, 7 Wall. 700, 725 (1869), and *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869), is puzzling to say the least. The Brethren make passing reference to the unique historical setting in which those cases were decided, *ante*, at 844, but pointedly ignore the significance of the events of those days. During the tenure of Mr. Chief Justice Chase, the War Between the States, fought to preserve the supremacy of the Union, was won; Congress and the States then enacted three constitutional Amendments, the Thirteenth, Fourteenth, and Fifteenth, enlarging federal power and concomitantly contracting the States' power, see *Ex parte Virginia*, 100 U. S. 339, 345 (1880); and Congress enacted a variety of laws during Reconstruction further restricting state

209-904 O - 78 - 58

adopted today is found in a line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930's. *E. g., Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); *United States* v. *Butler*, 297 U. S. 1 (1936); *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918). See Stern, The Commerce Clause and the National Economy, 1933–1946, 59 Harv. L. Rev. 645 (1946). We tend to forget that the Court invalidated legislation during the Great Depression, not solely under the Due Process Clause, but also and primarily under the Commerce Clause and the Tenth Amendment. It may have been the eventual abandonment of that overly restrictive construction of the commerce power that spelled defeat for the Court-packing plan, and preserved the integrity of this institution, *id.*, at 682, see, *e. g., United States* v. *Darby*, 312 U. S. 100 (1941); *Mulford* v. *Smith*, 307 U. S. 38 (1939); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), but my Brethren today are transparently trying to cut back on that recognition of the scope of the commerce power. My Brethren's approach to this case is not far different from the dissenting opinions in the cases that averted the crisis. See, *e. g., Mulford* v. *Smith*, *supra*, at 51 (Butler, J., dissenting); *NLRB* v. *Jones & Laughlin Steel Corp.*, *supra*, at 76 (McReynolds, J., dissenting).[9]

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sovereignty. *Texas* v. *White* itself noted that the Constitution empowered Congress to form a new government in a State if the citizens of that State were being denied a republican form of government. 7 Wall., at 729. And the Court recognized in *Lane County* that "[t]he people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme." 7 Wall., at 76.

[9] Even those dissenting opinions, however, were more faithful to the Constitution than is today's decision. They relied on the Tenth

That no precedent justifies today's result is particularly clear from the awkward extension of the doctrine of state immunity from federal taxation—an immunity conclusively distinguished by Mr. Justice Stone in *California*, and an immunity that is "narrowly limited" because "the people of all the states have created the national government and are represented in Congress," *Helvering* v. *Gerhardt*, 304 U. S. 405, 416 (1938) (Stone, J.)[10]—to fashion a judicially enforceable restraint on

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Amendment to invalidate federal legislation only because they found the enactments not within the scope of the commerce power, and thus not within a power delegated to Congress. More importantly, they made no distinction between private parties and States; in their view, what was not commerce for one was commerce for no one. My Brethren today, however, arrive at their novel constitutional theory in defiance of the plain language of the Tenth Amendment, differentiating "the people" from "the States." They apparently hold that a power delegated to Congress with respect to the former is, contrary to the clear wording of the Amendment, not delegated as to the latter, because this conclusion is more consonant with their view of a proper distribution of governmental power. But, "however socially desirable the goals sought to be advanced . . . , advancing them through a freewheeling nonelected judiciary is quite unacceptable in a democratic society." Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 699 (1976). Compare *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 605 (1976) (BLACKMUN, J., concurring in judgment), with *id.*, at 614 (STEWART, J., dissenting).

[10] The danger to the federal power to tax of hypothesizing any constraint, derived from state sovereignty and monitored by this Court, was expressly recognized:

"Another reason [for narrowly limiting state sovereignty restrictions on the power to tax] rests upon the fact that any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. When enlargement proceeds beyond the necessity of protecting the state, the burden of the immunity is thrown upon the national government with benefit only to a privileged class of taxpayers. See *Metcalf & Eddy* v. *Mitchell*,

Congress' exercise of the commerce power that the Court has time and again rejected as having no place in our constitutional jurisprudence.[11] "[W]here [Congress]

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269 U. S. 514 [1926]; cf. *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 588, 590 [1870]. With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the states when the Constitution was adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself. But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. See *South Carolina* v. *United States*, 199 U. S. 437, 454–455 [1905]. Once impaired by the recognition of a state immunity found to be excessive, restoration of that power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive." *Helvering* v. *Gerhardt*, 304 U. S., at 416–417 (footnote omitted).

[11] My Brethren also ignore our holdings that the principle of state sovereignty held to be embodied in the Eleventh Amendment can be overridden by Congress under the Commerce Clause. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976); *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). Although the Eleventh Amendment can be overcome by exercise of the power to regulate commerce, my Brethren never explain why the protections of state sovereignty they erroneously find embodied in the Tenth Amendment cannot similarly be overcome. Instead, they merely tell us which delegated powers are limited by state sovereignty, *ante*, at 843–844, n. 14, and which are not, *ante*, at 854–855, n. 18, see also *Kleppe* v. *New Mexico*, *ante*, p. 529, but neither reason nor precedent distinguishing among these powers is provided.

keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere." *Katzenbach* v. *McClung,* 379 U. S., at 305.

To argue, as do my Brethren, that the 1974 amendments are directed at the "States *qua* States," and "displac[e] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require," *ante,* at 847, and therefore "directly penaliz[e] the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose," *ante,* at 849, is only to advance precisely the unsuccessful arguments made by the State of Washington in *Case* v. *Bowles* and the State of California in *United States* v. *California.* The 1974 amendments are, however, an entirely legitimate exercise of the commerce power, not in the slightest restrained by any doctrine of state sovereignty cognizable in this Court, as *Case* v. *Bowles, United States* v. *California, Maryland* v. *Wirtz,* and our other pertinent precedents squarely and definitively establish. Moreover, since *Maryland* v. *Wirtz* is overruled, the Fair Labor Standards Act is invalidated in its application to all state employees "in [any areas] that the States have regarded as integral parts of their governmental activities." *Ante,* at 854 n. 18. This standard is a meaningless limitation on the Court's state-sovereignty doctrine, and thus today's holding goes beyond even what the States of Washington and California urged in *Case* v. *Bowles* and *United States* v. *California,* and by its logic would overrule those cases and with them *Parden* v. *Terminal R. Co.,* 377 U. S. 184 (1964), and certain reasoning in *Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279, 284–285 (1973). I cannot recall another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been

discarded in such a roughshod manner. That this is done without any justification not already often advanced and consistently rejected, clearly renders today's decision an *ipse dixit* reflecting nothing but displeasure with a congressional judgment.

My Brethren's treatment of *Fry* v. *United States*, 421 U. S. 542 (1975), further illustrates the paucity of legal reasoning or principle justifying today's result. Although the Economic Stabilization Act "displace[d] the States' freedom," *ante*, at 852—the reason given for invalidating the 1974 amendments—the result in *Fry* is not disturbed since the interference was temporary and only a national program enforced by the Federal Government could have alleviated the country's economic crisis. Thus, although my Brethren by fiat strike down the 1974 amendments without analysis of countervailing national considerations, *Fry* by contrary logic remains undisturbed because, on balance, countervailing national considerations override the interference with the State's freedom. Moreover, it is sophistry to say the Economic Stabilization Act "displaced no state choices," *ante*, at 853, but that the 1974 amendments do, *ante*, at 848. Obviously the Stabilization Act—no less than every exercise of a national power delegated to Congress by the Constitution—displaced the State's freedom. It is absurd to suggest that there is a constitutionally significant distinction between curbs against increasing wages and curbs against paying wages lower than the federal minimum.

Today's holding patently is in derogation of the sovereign power of the Nation to regulate interstate commerce. Can the States engage in businesses competing with the private sector and then come to the courts arguing that withdrawing the employees of those businesses from the private sector evades the power of the Federal Government to regulate commerce? See *New York* v.

United States, 326 U. S., at 582 (opinion of Frankfurter, J.). No principle given meaningful content by my Brethren today precludes the States from doing just that. Our historic decisions rejecting all suggestions that the States stand in a different position from affected private parties when challenging congressional exercise of the commerce power reflect that very concern. *Maryland* v. *Wirtz,* 392 U. S. 183 (1968); *United States* v. *California,* 297 U. S. 175 (1936). *Fry* only last Term emphasized "that States are not immune from all federal regulation under the Commerce Clause *merely because of their sovereign status.*" 421 U. S., at 548 (emphasis added). For "[b]y empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden* v. *Terminal R. Co., supra,* at 192; see *Employees* v. *Missouri Public Health Dept., supra,* at 286. Employment relations of States that subject themselves to congressional regulation by participating in regulable commerce are subject to congressional regulation. *California* v. *Taylor,* 353 U. S. 553, 568 (1957). Plainly it has gotten no earlier since we declared it "too late in the day to question the power of Congress under the Commerce Clause to regulate . . . activities and instrumentalities [in interstate commerce] . . . whether they be the activities and instrumentalities of private persons or of public agencies." *California* v. *United States,* 320 U. S. 577, 586 (1944).

Also devoid of meaningful content is my Brethren's argument that the 1974 amendments "displac[e] State policies." *Ante,* at 847. The amendments neither impose policy objectives on the States nor deny the States complete freedom to fix their own objectives. My Brethren boldly assert that the decision as to wages and hours is an "undoubted attribute of state sovereignty,"

ante, at 845, and then never say why. Indeed, they disclaim any reliance on the costs of compliance with the amendments in reaching today's result. *Ante*, at 846, 851. This would enable my Brethren to conclude that, however insignificant that cost, any federal regulation under the commerce power "will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships." *Ante*, at 851.[12]

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[12] My Brethren's reluctance to rely on the cost of compliance to invalidate this legislation is advisable.

"Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts." *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U. S., at 527. See *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279 284 (1973). Although my Brethren accept for present purposes the well-pleaded allegations of appellants' complaint, I note that the Secretary vigorously argues in this Court that appellants' cost allegations are greatly exaggerated and based on misinterpretations of the 1974 amendments. For example, the executive vice president of the National League of Cities stated in a deposition that the federal minimum wage would have little impact on city budgets since "most cities were already in compliance." App. 124. My Brethren's concern about the use of volunteers is also unfounded. No provision proscribes the use of volunteers or regulates their compensation in any way. Indeed, the Department of Labor's regulations read the FLSA as providing that payments to individuals below a certain level are presumptive evidence of volunteer status; above that level volunteer status depends on particular circumstances. 29 CFR § 553.11 (1975). That the question whether an individual is an employee or a volunteer might be resolved in the courts has nothing to do with federalism, since Congress has rationally decided to regulate the wages of state employees under the Commerce Clause. The Secretary also maintains that misconceptions permeate the other claims of final impact, such as the failure to account for overtime exemptions for police and fire personnel, 29 U. S. C. § 207 (k) (1970 ed., Supp. IV), but further analysis of appellants' allegations would not be profitable, nor might it even be possible in view of their failure to specify adequately the method of calculating the costs.

This then would mean that, whether or not state wages are paid for the performance of an "essential" state function (whatever that may mean), the newly discovered state-sovereignty constraint could operate as a flat and absolute prohibition against congressional regulation of the wages and hours of state employees under the Commerce Clause. The portent of such a sweeping holding is so ominous for our constitutional jurisprudence as to leave one incredulous.

Certainly the paradigm of sovereign action—action *qua* State—is in the enactment and enforcement of state laws. Is it possible that my Brethren are signaling abandonment of the heretofore unchallenged principle that Congress "can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause"? *Bethlehem Steel Co.* v. *New York State Board,* 330 U. S. 767, 780 (1947) (opinion of Frankfurter, J.). Indeed, that principle sometimes invalidates state laws regulating subject matter of national importance even when Congress has been silent. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824); see *Sanitary District* v. *United States,* 266 U. S., at 426. In either case the ouster of state laws obviously curtails or prohibits the States' prerogatives to make policy choices respecting subjects clearly of greater significance to the "State *qua* State" than the minimum wage paid to state employees. The Supremacy Clause dictates this result under "the federal system of government embodied in the Constitution." *Ante,* at 852.

My Brethren do more than turn aside longstanding constitutional jurisprudence that emphatically rejects today's conclusion. More alarming is the startling restructuring of our federal system, and the role they create therein for the federal judiciary. This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure. If the 1974 amend-

ments have any "vice," *ante*, at 849, my Brother STEVENS is surely right that it represents "merely . . . a policy issue which has been firmly resolved by the branches of government having power to decide such questions." *Post*, at 881. It bears repeating "that effective restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes." *Wickard* v. *Filburn*, 317 U. S., at 120.

It is unacceptable that the judicial process should be thought superior to the political process in this area. Under the Constitution the Judiciary has no role to play beyond finding that Congress has not made an unreasonable legislative judgment respecting what is "commerce." My Brother BLACKMUN suggests that controlling judicial supervision of the relationship between the States and our National Government by use of a balancing approach diminishes the ominous implications of today's decision. Such an approach, however, is a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress.

Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both the Senate and House *elected from the States*. The Federalist No. 45, pp. 311–312, No. 46, pp. 317–318 (J. Cooke ed. 1961) (J. Madison). Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves. Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our fed-

eralism that the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress. See Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Col. L. Rev. 543 (1954). There is no reason whatever to suppose that in enacting the 1974 amendments Congress, even if it might extensively obliterate state sovereignty by fully exercising its plenary power respecting commerce, had any purpose to do so. Surely the presumption must be to the contrary. Any realistic assessment of our federal political system, dominated as it is by representatives of the people *elected from the States,* yields the conclusion that it is highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States.[13] The Federalist No. 46, *supra,* at 319. Certainly this was the premise upon which the Constitution, as authoritatively explicated in *Gibbons* v. *Ogden,* was founded. Indeed, though the States are represented in

[13] The history of the 1974 amendments is a striking example of the political process in operation. When Congress in 1973 passed FLSA amendments that extended coverage to state and local employees, the President vetoed the bill and stated among his objections that "[e]xtension of Federal minimum wage and overtime standards to State and local government employees is an unwarranted interference with State prerogatives." 119 Cong. Rec. 28743 (1973). The veto was sustained. *Id.,* at 30266, 30292. But when Congress moderated its position and passed the bill in another form, the President signed it and noted the compromise: "S. 2747 also extends coverage to include Federal, State, and local government employees, domestic workers, and others previously excluded from coverage. The Congress has reduced some of the economic and social disruptions this extension could cause by recognizing the unique requirements of police, fire, and correctional services." 10 Weekly Comp. of Presidential Documents 392 (1974).

the National Government, national interests are not similarly represented in the States' political processes. Perhaps my Brethren's concern with the Judiciary's role in preserving federalism might better focus on whether Congress, not the States, is in greater need of this Court's protection. See *New York* v. *United States*, 326 U. S., at 582 (opinion of Frankfurter, J.); *Helvering* v. *Gerhardt*, 304 U. S., at 416.

A sense of the enormous impact of States' political power is gained by brief reference to the federal budget. The largest estimate by any of the appellants of the cost impact of the 1974 amendments—$1 billion—pales in comparison with the financial assistance the States receive from the Federal Government. In fiscal 1977 the President's proposed budget recommends $60.5 billion in federal assistance to the States, exclusive of loans. Office of Management and Budget, Special Analyses: Budget of the United States Government, Fiscal Year 1977, p. 255. Appellants complain of the impact of the amended FLSA on police and fire departments, but the 1977 budget contemplates outlays for law enforcement assistance of $716 million. *Id.*, at 258. Concern is also expressed about the diminished ability to hire students in the summer if States must pay them a minimum wage, but the Federal Government's "summer youth program" provides $400 million for 670,000 jobs. *Ibid.* Given this demonstrated ability to obtain funds from the Federal Government for needed state services, there is little doubt that the States' influence in the political process is adequate to safeguard their sovereignty.[14]

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[14] In contrast, my Brethren frequently remand powerless individuals to the political process by invoking doctrines of standing, justiciability, and remedies. For example, in *Warth* v. *Seldin*, 422 U. S. 490 (1975), the Court suggested that some residents of Rochester,

My Brethren's disregard for precedents recognizing these long-settled constitutional principles is painfully obvious in their cavalier treatment of *Maryland* v. *Wirtz*. Without even a passing reference to the doctrine of *stare decisis*, *Wirtz*—regarded as controlling only last Term, *Fry* v. *United States*, 421 U. S., at 548, and as good law in *Employees* v. *Missouri Public Health Dept.*, 411 U. S., at 283—is by exercise of raw judicial power overruled.

No effort is made to distinguish the FLSA amendments sustained in *Wirtz* from the 1974 amendments. We are told at the outset that "the 'far-reaching implications' of *Wirtz* should be overruled," *ante*, at 840; later it is said that the "reasoning in *Wirtz*" is no longer "authoritative," *ante*, at 854. My Brethren then merely restate their essential-function test and say that *Wirtz* must "therefore" be overruled. *Ante*, at 855–856. There is no analysis whether *Wirtz* reached the correct result, apart from any flaws in reasoning, even though we are told that "there are obvious differences" between this case and *Wirtz*. *Ante*, at 855.[15] Are state and fed-

N. Y., "not overlook the availability of the normal democratic process," *id.*, at 508 n. 18, even though they were challenging a suburban zoning ordinance and had no voice in the suburb's political affairs. In this case, however, those entities with perhaps the greatest representation in the political process have lost a legislative battle, but when they enter the courts and repeat the arguments made in the political branches, the Court welcomes them with open arms, embraces their political cause, and overrides Congress' political decision.

[15] In contrast, the Court measures the legislation at issue in *Fry* in light of today's decision, although, as I have noted, that consideration amounts to a repudiation of the Court's holding. See *supra*, at 872. Just as the reasoning of *Wirtz* is rejected, however, the reasoning of *Fry*, decided only last Term, must also be deemed rejected, for it adhered totally to the principles of *Wirtz*. That the Economic Stabilization Act was an emergency measure was not dispositive in *Fry;* it merely rendered the Act "even less intrusive" than the "quite limited" legislation sustained in *Wirtz*. 421 U. S., at 548.

eral interests being silently balanced, as in the discussion of *Fry, ante,* at 853? The best I can make of it is that the 1966 FLSA amendments are struck down and *Wirtz* is overruled on the basis of the conceptually unworkable essential-function test; and that the test is unworkable is demonstrated by my Brethren's inability to articulate any meaningful distinctions among state-operated railroads, see *ante,* at 854–855, n. 18, state-operated schools and hospitals, and state-operated police and fire departments.

We are left then with a catastrophic judicial body blow at Congress' power under the Commerce Clause. Even if Congress may nevertheless accomplish its objectives—for example, by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards, cf. *Oklahoma* v. *CSC,* 330 U. S. 127, 144 (1947)—there is an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision. I dissent.

MR. JUSTICE STEVENS, dissenting.

The Court holds that the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.

The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor's limousine over 55 miles an hour. Even though these and many other

activities of the capitol janitor are activities of the State *qua* State, I have no doubt that they are subject to federal regulation.

I agree that it is unwise for the Federal Government to exercise its power in the ways described in the Court's opinion. For the proposition that regulation of the minimum price of a commodity—even labor—will increase the quantity consumed is not one that I can readily understand. That concern, however, applies with even greater force to the private sector of the economy where the exclusion of the marginally employable does the greatest harm and, in all events, merely reflects my views on a policy issue which has been firmly resolved by the branches of government having power to decide such questions. As far as the complexities of adjusting police and fire departments to this sort of federal control are concerned, I presume that appropriate tailor-made regulations would soon solve their most pressing problems. After all, the interests adversely affected by this legislation are not without political power.

My disagreement with the wisdom of this legislation may not, of course, affect my judgment with respect to its validity. On this issue there is no dissent from the proposition that the Federal Government's power over the labor market is adequate to embrace these employees. Since I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid. Accordingly, with respect and a great deal of sympathy for the views expressed by the Court, I dissent from its constitutional holding.

Reporter's Note

The next page is purposely numbered 901. The numbers between 881 and 901 were intentionally omitted in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

209-904 O - 78 - 59

ORDERS FROM JUNE 1 THROUGH JUNE 23, 1976

JUNE 1, 1976

Appeals Dismissed

No. 74–1335. RINGGOLD ET AL. *v.* BOROUGH OF COLLINGSWOOD. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would vacate judgment and remand case for further consideration in light of *Hynes* v. *Mayor of Borough of Oradell,* 425 U. S. 610 (1976). MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 66 N. J. 350, 331 A. 2d 262.

No. 75–1410. POINDEXTER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 531 S. W. 2d 350.

No. 75–1449. WILLIAMS *v.* WILLIAMS. Appeal from Sup. Ct. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 543 P. 2d 1401.

No. 75–6574. ABREVAYA *v.* BEHAR. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 50 App. Div. 2d 572, 375 N. Y. S. 2d 844.

No. 75–1498. GOLZ ET UX. *v.* CHILDREN'S BUREAU OF NEW ORLEANS, INC. Appeal from Sup. Ct. La. dis-

missed for want of substantial federal question. Reported below: 326 So. 2d 865.

Certiorari Granted—Vacated and Remanded

No. 75–6202. HURST *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States filed May 7, 1976, judgment vacated and case remanded for further consideration in light of position presently asserted by the Government. Reported below: 530 F. 2d 977.

No. 75–6265. HARRIS *v.* ROSE, WARDEN. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Estelle* v. *Williams,* 425 U. S. 501 (1976).

Certiorari Dismissed

No. 75–6578. MCGRATH *v.* VINZANT, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari dismissed. *Molinaro* v. *New Jersey,* 396 U. S. 365 (1970). Reported below: 528 F. 2d 681.

Miscellaneous Orders

No. A–1021. GOURLEY, DIRECTOR, DIVISION OF FAMILY SERVICES OF MISSOURI, ET AL. *v.* LEWIS. Application for stay of mandate of the United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted pending timely filing and disposition of petition for writ of certiorari. Reported below: 534 F. 2d 794.

No. 75–478. PARKER SEAL CO. *v.* CUMMINS. C. A. 6th Cir. [Certiorari granted, 424 U. S. 942.] Motion of International Association of Machinists & Aerospace Workers for leave to file a brief as *amicus curiae* granted.

No. A–979. YAVITZ *v.* UNITED STATES. Application for stay of order of confinement or for bail pending appeal in the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. 75–628. CRAIG ET AL. *v.* BOREN, GOVERNOR OF OKLAHOMA, ET AL. D. C. W. D. Okla. [Probable jurisdiction noted, 423 U. S. 1047.] Motion to add Donald Basil Bardwell as a party appellant denied.

No. 75–804. FARMER, SPECIAL ADMINISTRATOR *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 25, ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 423 U. S. 1086.] Motion to substitute Joy A. Farmer, Special Administrator, as the party petitioner, in place of Richard T. Hill, deceased, granted.

No. 75–946. CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS COMMISSION ET AL. Appeal from Sup. Ct. Wis. [Probable jurisdiction noted, 424 U. S. 941.] Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted.

No. 75–1180. DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA, ET AL. *v.* THOMAS ET AL., 425 U. S. 937. Motion of counsel for respondent Wilbur Kenyard Thomas for award of attorney's fees denied.

No. 75–1452. KIMBELL, INC., DBA FOODWAY, ET AL. *v.* EMPLOYMENT SECURITY COMMISSION OF NEW MEXICO ET AL. Appeal from Sup. Ct. N. M. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–1447. BERGER, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* AITCHISON. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Probable Jurisdiction Noted

No. 75–1261. BUTZ, SECRETARY OF AGRICULTURE *v.* HEIN; and

No. 75–1355. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* HEIN. Appeals from D. C. S. D. Iowa. Motion of appellee Hein for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 402 F. Supp. 398.

Certiorari Granted

No. 75–909. ENVIRONMENTAL PROTECTION AGENCY *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL.; AND ENVIRONMENTAL PROTECTION AGENCY *v.* ARIZONA ET AL. C. A. 9th Cir. Reported below: 521 F. 2d 827 (first case); 521 F. 2d 825 (second case);

No. 75–960. ENVIRONMENTAL PROTECTION AGENCY *v.* MARYLAND ET AL. C. A. 4th Cir. Reported below: 530 F. 2d 215;

No. 75–1050. VIRGINIA EX REL. AIR POLLUTION CONTROL BOARD *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Reported below: 172 U. S. App. D. C. 311, 521 F. 2d 971; and

No. 75–1055. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Reported below: 172 U. S. App. D. C. 311, 521 F. 2d 971. Certiorari granted, cases consolidated, and a total of two hours allotted for oral argument.

No. 74–635. UNITED STATES *v.* WONG. C. A. 9th Cir. Certiorari granted. Reported below: 553 F. 2d 576.

No. 74–1106. UNITED STATES *v.* WASHINGTON. Ct. App. D. C. Certiorari granted. Reported below: 328 A. 2d 98.

No. 75–1413. STANTON, ADMINISTRATOR, INDIANA DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* BOND ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 528 F. 2d 688.

No. 75–1443. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* SANDERS. C. A. 7th Cir. Certiorari granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 522 F. 2d 1167.

Certiorari Denied. (See also Nos. 75–1410, 75–1449, and 75–6574, *supra.*)

No. 74–6579. WASHINGTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 328 A. 2d 98.

No. 75–968. ROEDER *v.* UNITED STATES C. A. 10th Cir. Certiorari denied. Reported below: 526 F. 2d 736.

No. 75–1043. LEBRON *v.* SECRETARY OF THE AIR FORCE. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1242.

No. 75–1175. MAHER, ADMINISTRATRIX *v.* CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 1051.

No. 75–1188. KEILEY *v.* HINKSON, DIRECTOR, PARKING VIOLATIONS BUREAU OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1242.

No. 75–1190. WYOMING ET AL. *v.* KLEPPE, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 525 F. 2d 66.

No. 75–1193. COTRONI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 708.

No. 75–1213. PIKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 734.

No. 75–1218. RUSSO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 527 F. 2d 1051.

No. 75–1233. REA EXPRESS, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 524 F. 2d 54.

No. 75–1273. COWSEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 734.

No. 75–1298. AMERICAN ALUMINUM CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1278.

No. 75–1320. COOPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–1323. MCCRANE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 527 F. 2d 906.

No. 75–1324. CONLEY *v.* ECK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 967.

No. 75–1339. WILSON *v.* UNITED STATES. C. A. 6th Certiorari denied. Reported below: 491 F. 2d 724.

No. 75–1390. HARRIS *v.* ULANICH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 968.

No. 75–1391. BISPING *v.* VIRGINIA. Cir. Ct., City of Norfolk, Va. Certiorari denied.

No. 75–1411. CHAFFIN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 324 So. 2d 369.

No. 75–1412. DUNN *v.* KAPILOFF ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 27 Md. App. 514, 343 A. 2d 251.

No. 75–1421. GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 281, 515 F. 2d 998.

No. 75–1426. BOGATIN *v.* SUFFOLK COUNTY BAR ASSN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 49 App. Div. 2d 108, 373 N. Y. S. 2d 179.

No. 75–1428. FORD MOTOR CO. *v.* POLK. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 259.

No. 75–1433. ALBRIGHT, ADMINISTRATOR *v.* R. J. REYNOLDS TOBACCO CO. C. A. 3d Cir. Certiorari denied. Reported below: 531 F. 2d 132.

No. 75–1442. JIMMY-RICHARD CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 20, 527 F. 2d 803.

No. 75–1457. MCCLOUD *v.* HAYES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 525.

No. 75–1515. LOCAL 17, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION *v.* PARAMOUNT TRANSPORT SYSTEMS. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 1284.

No. 75—6185. ARNOLD ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 964.

No. 75–6204. HARBOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75–6231. AKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75–6258. TENNON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 594, 220 S. E. 2d 914.

No. 75–6270. RAJEWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 526 F. 2d 149.

No. 75–6303. MASTERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 30.

No. 75–6306. MONTGOMERY *v.* UNITED STATES C. A. 10th Cir. Certiorari denied. Reported below: 529 F. 2d 1404.

No. 75–6311. CEPULONIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 238.

No. 75–6340. WILLIAMS *v.* UNITED STATES C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 557.

No. 75–6320. GUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1230.

No. 75–6362. DELOACH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 138, 530 F. 2d 990.

No. 75–6376. HOLLEY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75–6377. ECKENROD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 964.

No. 75–6382. MUSE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75–6391. MONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1031.

No. 75–6392. CASEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 206.

No. 75–6404. VALDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 996.

No. 75–6413. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 581.

No. 75–6415. SILVA-GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6419. LANGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 926.

No. 75–6433. COOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 145.

No. 75–6437. BARTOS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 966, 529 F. 2d 532.

No. 75–6540. MUDGETT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 531 S. W. 2d 275.

No. 75–6549. WHITESIDE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 75–6558. MILLER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 75–6562. WESSNER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 236 Ga. 162, 223 S. E. 2d 141.

No. 75–6563. SHANNON *v.* EDWARDS ET AL. C. A. 8th Cir. Certiorari denied.

No. 75–6577. CORTO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 75–6580. NABERS *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 75–6582. NEGRON *v.* MOTLEY, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied.

No. 75–6584. ALLEN *v.* LYON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 963.

No. 75–6589. LEE, AKA BROWN *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 75–6591. BURTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1406.

No. 75–6593. FELDER *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–6595. STILLER *v.* KETNER'S CAFETERIA ET AL. Ct. App. N. C. Certiorari denied.

No. 75–6597. HARVEY *v.* SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 840.

No. 75–6685. CHAVEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 491.

No. 74–735. NICKELS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 502 F. 2d 1173.

No. 75–1429. YEE *v.* YEE ET AL. Sup. Ct. Hawaii. Certiorari and other relief denied.

No. 75–1290. BROWN & WILLIAMSON TOBACCO CORP. ET AL. *v.* DIXON, ACTING CHAIRMAN, FEDERAL TRADE COMMISSION, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 527 F. 2d 1115.

No. 75–1297. CALIFORNIA *v.* GARCIA. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 54 Cal. App. 3d 61, 126 Cal. Rptr. 275.

No. 75–1448. COMMISSIONER, DEPARTMENT OF CORRECTIONAL SERVICES OF NEW YORK, ET AL. *v.* MUKMUK, AKA CHOLMONDELEY. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 529 F. 2d 272.

No. 75–1295. BRYZA *v.* UNITED STATES C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 522 F. 2d 414.

Rehearing Denied

No. 75–1072. BLANTON *v.* UNITED STATES, 425 U. S. 935;

No. 75–1110. BUFFA *v.* UNITED STATES, 425 U. S. 936;

No. 75–1292. KOEHLER, WARDEN *v.* CHISM, 425 U. S. 944;

No. 75–5922. FERRIS *v.* ILLINOIS, 425 U. S. 938;

No. 75–6234. MCCOLLIN *v.* BRITT, PENITENTIARY SUPERINTENDENT, 425 U. S. 940;

No. 75–6294. REED *v.* DEL CHEMICAL CORP. ET AL., 425 U. S. 941; and

No. 75–6343. GRAVINA *v.* SWITZERLAND ET AL., 425 U. S. 961. Petitions for rehearing denied.

No. 74–940. COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES; and

No. 74–949. AKIN ET AL. *v.* UNITED STATES, 424 U. S. 800. Motion of Southern Ute Indian Tribe et al. for for leave to file a petition for rehearing as *amici curiae* denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the First Circuit from September 8 to September 15, 1976, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JUNE 7, 1976

Affirmed on Appeal

No. 73–1915. PERKINS *v.* SMITH ET AL. Affirmed on appeal from D. C. Md. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 370 F. Supp. 134.

No. 75–336. CALIFORNIA STATE BOARD OF PHARMACY ET AL. *v.* TERRY ET AL. Affirmed on appeal from D. C. N. D. Cal. Reported below: 395 F. Supp. 94.

No. 75–1496. CARINO *v.* GRASSO, GOVERNOR OF CONNECTICUT. Affirmed on appeal from D. C. Conn.

Appeals Dismissed

No. 75–1119. FILM FOLLIES, INC. *v.* HAAS, DISTRICT ATTORNEY OF MULTNOMAH COUNTY, ET AL. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 22 Ore. App. 365, 539 P. 2d 669.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Appellant brought this suit in the Circuit Court for Multnomah County, Ore., seeking a declaration that 1973 Ore. Laws, c. 699, § 4, and Ore. Rev. Stat. § 167.060 (10) (1975) violate the First and Fifth Amendments as applied to the States through the Fourteenth Amendment, and asking that enforcement of those statutes be enjoined. The Circuit Court dismissed appellant's complaint, and the Court of Appeals for the State of Oregon affirmed. 22 Ore. App. 365, 539 P. 2d 669 (1975). The Supreme Court of Oregon denied review.

1973 Ore. Laws, c. 699, § 4, provides in pertinent part:

"(1) A person commits the crime of disseminating

obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.

"(2) As used in subsection (1) of this section, matter is obscene if:

"(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value."

Oregon Rev. Stat. § 167.060 (10) (1975) provides:

"'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, 1973 Ore. Laws, c. 699, § 4, as it incorporates the definition of sexual conduct in Ore. Rev. Stat. § 167.060 (10) (1975), is constitutionally overbroad

and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore note probable jurisdiction and, since the judgment of the Court of Appeals for the State of Oregon was rendered after *Miller*, reverse. In that circumstance, I have no occasion to consider whether the other question presented by appellant merits plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the jurisdictional statement and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, appellant must be given an opportunity to have its case decided on, and introduce evidence relevant to, the legal standard upon which the state judgment has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether appellant should be afforded a new hearing under local community standards.

No. 75–1430. ROBINSON *v.* CITY OF CHICAGO. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 32 Ill. App. 3d 149, 336 N. E. 2d 158.

No. 75–6605. WHITE *v.* GUILD. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 532 F. 2d 753.

No. 75–6640. PRICE *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of a final judgment (28 U. S. C. § 1257).

Vacated and Remanded on Appeal

No. 75–1539. BOARD OF OPTOMETRY OF CALIFORNIA *v.* CALIFORNIA CITIZENS ACTION GROUP ET AL. Appeal from D. C. C. D. Cal. Motion of American Optometric Assn. for leave to file a brief as *amicus curiae* granted. Judgment vacated and case remanded for further consideration in light of *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). Reported below: 407 F. Supp. 1075.

Other Summary Disposition on Appeal

No. 74–216. UNITED STATES CIVIL SERVICE COMMISSION ET AL. *v.* RAMOS ET AL. Appeal from D. C. P. R. Motion of appellees for leave to proceed *in forma pauperis* granted. Insofar as judgment of the United States District Court for the District of Puerto Rico declares 5 CFR § 338.101 (1976) to be invalid, it is affirmed. *Hampton* v. *Mow Sun Wong, ante,* p. 88. Because the current Appropriation Act's exclusion of payments to aliens for positions within the United States does not apply to Cuban nationals like the plaintiff-appellees, Pub. L. 94–91, 89 Stat. 458, the District Court is directed to vacate as moot that part of its judgment holding § 601 of the Treasury, Postal Service, and General Government Appropriation Act of 1973, Pub. L. 92–351, 86 Stat. 487, unconstitutional.

Insofar as appellants seek to appeal from the District Court's holding that 7 U. S. C. § 1961 (b)(1) and FHA Instruction 441.2 are unconstitutional, the appeal is dismissed for want of jurisdiction. The District Court failed to enter an injunction from which an appeal lies under 28 U. S. C. § 1253 and the notice of appeal was

not filed within 30 days of any arguably appealable order. See 28 U. S. C. §§ 2101 (a) and (b). The District Court may reconsider its holding in light of *Hampton* v. *Mow Sun Wong, ante,* p. 88, and *Mathews* v. *Diaz, ante,* p. 67, before it enters a final judgment. Reported below: 376 F. Supp. 361.

Certiorari Granted—Vacated and Remanded. (See also, 75–1382, *ante,* p. 310.)

No. 74–1600. SALONE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chandler* v. *Roudebush,* 425 U. S. 840 (1976). Reported below: 511 F. 2d 902.

Miscellaneous Orders

No. A–920 (75–1482). GEISHA HOUSE, INC. *v.* CULLINANE, CHIEF, DISTRICT OF COLUMBIA POLICE DEPARTMENT, ET AL. Ct. App. D. C. Application for stay of execution and enforcement of judgment, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 354 A. 2d 515.

No. A–1009. CROW DOG *v.* UNITED STATES. Application for stay of execution and enforcement of mandate of the United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. Reported below: 532 F. 2d 1182.

No. A–1052. GROSS *v.* UNITED STATES. Application for stay of execution and enforcement of judgment of conviction in United States District Court for the District of New Jersey, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: See 375 F. Supp. 971.

No. A–1039. G. E. M. Corp., dba Gene Thomas Cascade Lounge *v.* Liquor Control Commission of Ohio. Application for stay of judgment of the Supreme Court of Ohio, presented to Mr. Justice Marshall, and by him referred to the Court, denied.

No. A–1042. Mathias et al. *v.* Derrick et al. Application for stay of judgment of the United States District Court for the Western District of Texas, Waco Division, presented to Mr. Justice Powell, and by him referred to the Court, denied.

No. 74–6257. Gregg *v.* Georgia. Sup. Ct. Ga. [Certiorari granted, 423 U. S. 1082.] Motion of respondent for leave to file supplemental brief after argument granted.

No. 75–44. Burrell et al. *v.* McCray et al. C. A. 4th Cir. [Certiorari granted, 423 U. S. 923.] Motion of respondents for leave to file second supplemental brief, after argument, granted.

Probable Jurisdiction Noted

No. 75–443. Carey, Governor of New York, et al. *v.* Population Services International et al. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 398 F. Supp. 321.

No. 75–1157. Town of Lockport, New York, et al. *v.* Citizens for Community Action at the Local Level, Inc., et al. Appeal from D. C. W. D. N. Y. Probable jurisdiction noted. Reported below: See 386 F. Supp. 1.

No. 75–1407. Trainor, Director, Illinois Department of Public Aid, et al. *v.* Hernandez et ux. Appeal from D. C. N. D. Ill. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 405 F. Supp. 757.

No. 75–6297. FIALLO, A MINOR, BY RODRIGUEZ, ET AL. *v.* LEVI, ATTORNEY GENERAL, ET AL. Appeal from D. C. E. D. N. Y. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Case set for oral argument with No. 75–5952 [*Trimble* v. *Gordon*, probable jurisdiction noted, 424 U. S. 964]. Reported below: 406 F. Supp. 162.

Certiorari Granted

No. 75–1312. DON E. WILLIAMS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari granted. Reported below: 527 F. 2d 649.

No. 75–1462. DELAWARE REPUBLICAN STATE COMMITTEE ET AL. *v.* REDFEARN ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 524 F. 2d 1403.

Certiorari Denied. (See also No. 75–6605, *supra.*)

No. 75–60. VINCENT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 513 F. 2d 1296.

No. 75–158. BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE ET AL. *v.* SONI. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 347.

No. 75–247. UNITED STATES *v.* SPERLING. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 465.

No. 75–405. NATIONAL COMMISSION ON EGG NUTRITION *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 517 F. 2d 485.

No. 75–618. ATWELL *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 59 Mich. App. 219, 229 N. W. 2d 387.

No. 75–784. SIMON, SECRETARY OF THE TREASURY, ET AL. *v.* CARO. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 2d 1084.

No. 75–828. MOSES ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 339 A. 2d 46.

No. 75–1331. CLAYTON P. KEHOE TOWING CO., INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 75–1332. TANKER HYGRADE NO. 18, INC. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 488, 526 F. 2d 805.

No. 75–1346. BOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1406.

No. 75–1347. URDIALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1245.

No. 75–1364. BUGLIARELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–1367. SCHIFTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–1368. ACOSTA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 670.

No. 75–1370. PIERRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75–1374. DOWELL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 708.

No. 75–1380. SARAH COVENTRY, INC. *v.* T. SARDELLI & SONS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 526 F. 2d 20.

No. 75–1383. MCCORVEY SHEET METAL WORKS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 238.

No. 75–1437. JOHNSON *v.* O'CONNOR ET UX. Sup. Ct. Conn. Certiorari denied.

No. 75–1460. PEORIA & EASTERN RAILWAY CO. *v.* PENN CENTRAL TRANSPORTATION CO., TRUSTEES IN BANKRUPTCY. C. A. 3d Cir. Certiorari denied. Reported below: 527 F. 2d 645.

No. 75–1461. CHAVEZ ET AL. *v.* STATE HIGHWAY DEPARTMENT OF NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied.

No. 75–1467. UNITED STATES GYPSUM CO. ET AL. *v.* JACKSONVILLE BUSINESS SERVICES, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 328 So. 2d 845.

No. 75–1469. LAMBERTSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 528 F. 2d 441.

No. 75–1483. CITY OF CHICAGO *v.* KENNY CONSTRUCTION CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 528 F. 2d 184.

No. 75–1485. ASH *v.* BAKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 963.

No. 75–1516. FIRE OFFICERS UNION ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 501.

No. 75–1542. WARRINER *v.* FERNANDEZ ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 310 So. 2d. 375.

No. 75–1551. SAMPSON ET AL., DBA SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 656, 529 F. 2d 1299.

No. 75–1608. WHITNEY *v.* BRANN ET VIR. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 966.

No. 75–1611. MEHRA, ADMINISTRATOR *v.* BENTZ ET VIR. C. A. 2d Cir. Certiorari denied. Reported below: 529 F. 2d 1137.

No. 75–1635. COMBS *v.* TEXAS. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 526 S. W. 2d 648.

No. 75–6321. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1249.

No. 75–6334. JONES, AKA SHARIFF *v.* UNITED STATES; and

No. 75–6358. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 186.

No. 75–6338. STEWART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 531 F. 2d 326.

No. 75–6341. SIMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6345. FLEMING *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–6356. LOVELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 238.

No. 75–6367. WIMBERLY *v.* UNITED STATES; and

No. 75–6412. FOWLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 528.

No. 75–6369. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 962.

No. 75–6411. NELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 40.

No. 75–6371. MARSHALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 526 F. 2d 1349.

No. 75–6416. FREUND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 532 F. 2d 501.

No. 75–6417. GONZALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–6418. BENSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 926.

No. 75–6421. COUNTS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 542.

No. 75–6422. HERGENRADER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 83.

No. 75–6426. MIRANDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6428. FRUGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1406.

No. 75–6432. ROCHA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 423.

No. 75–6436. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–6444. CARROLL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 507.

No. 75–6460. HENDRICKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 585.

209-904 O - 78 - 60

No. 75–6479. MILROY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 1033.

No. 75–6515. CAVANAUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75–6532. ROBINSON *v.* GOYNES. C. A. 5th Cir. Certiorari denied.

No. 75–6537. BELL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 520.

No. 75–6559. TABOR *v.* CAMPBELL, ASSISTANT CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 8th Cir. Certiorari denied.

No. 75–6575. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 1125.

No. 75–6590. FLETCHER *v.* LEWIS A. JAMMER CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 964.

No. 75–6602. HUFFMAN *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 527 F. 2d 899.

No. 75–6608. GIBSON ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–6611. SLOCUM *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 52 Cal. App. 3d 867, 125 Cal. Rptr. 442.

No. 75–6613. MOORE *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 45 Ohio St. 2d 57, 341 N. E. 2d 302.

No. 75–6615. FOUNTS *v.* POGUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1232.

No. 75–6616. GREEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 62 Ill. 2d 146, 340 N. E. 2d 9.

No. 75–6622. KITTRELL ET AL. *v.* CITY OF ROCKWALL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 715.

No. 75–6623. CARTER *v.* MONEY TREE CO. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 2d 113.

No. 75–6624. FULMOR *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–6626. MELONSON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 813.

No. 75–6627. DAVID *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–6655. RIGGINS *v.* MEACHUM, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 75–928. ESTELLE, CORRECTIONS DIRECTOR, ET AL. *v.* JUSTICE, U. S. DISTRICT JUDGE, ET AL. C. A. 5th Cir. Motion of respondent inmates for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 516 F. 2d 480.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The writ of mandamus is granted sparingly and is "reserved for really extraordinary causes," *Ex parte Fahey*, 332 U. S. 258, 260 (1947). It seems to me that

the course of this litigation in the United States District Court for the Eastern District of Texas makes it a "really extraordinary" case, and I would grant certiorari to review the decision of the Court of Appeals for the Fifth Circuit declining to issue the writ sought by petitioners.

Sometime prior to April 1974, David Ruiz and other inmates of the Texas Department of Corrections sued petitioner Estelle, Director of the Texas Department of Corrections, in the United States District Court for the Eastern District of Texas seeking declaratory and equitable relief from alleged deprivations of rights secured to the plaintiffs by the Constitution of the United States. Jurisdiction was based upon 28 U. S. C. § 1343 and 42 U. S. C. § 1983. On April 12, 1974, respondent the Honorable William Wayne Justice, a judge of the United States District Court for the Eastern District of Texas, ordered the *Ruiz* case consolidated with several other pending causes in the District which he found to involve common questions of law and fact, and proceeded, *sua sponte,* to enter the following additional order:

> "This Court having also determined that the public interest will be served by the participation of the United States of America in the consolidated civil action, it is
>
> "ORDERED that the United States of America make an appearance in the above-entitled and numbered consolidated civil action as *amicus curiae,* in order to investigate fully the facts alleged in the prisoners' complaints, to participate in such civil action with the full rights of a party thereto, and to advise this Court at all stages of the proceedings as to any action deemed appropriate by it."

Not surprisingly, the United States some months later filed a motion to intervene in the action, and to add parties defendant thereto. Despite the familiar rule that

an intervenor take the case as he finds it, respondent granted not only the motion of the United States to intervene, but also that seeking to add as parties defendant the Texas Board of Corrections, and the members of that Board as individuals. In addition, the complaint in intervention of the United States sought relief which went far beyond that sought by the inmates, requesting an order enjoining petitioners from the following:

> "1. Failing or refusing to provide inmates with a medical care delivery system which is accessible and adequate to meet their medical needs;
>
> "2. Failing or refusing to provide living and working conditions which do not jeopardize the health and safety of inmates;
>
> "3. Failing or refusing to provide inmates reasonable protection from physical assault;
>
> "4. Failing or refusing to permit inmates reasonable access to the Courts and to public officials for redress of grievances;
>
> "5. Failing or refusing to supervise and control prison officials and employees sufficiently to prevent the systematic imposition of summary and other cruel and unusual punishment on inmates and the systematic denial of due process to inmates."

Petitioners opposed the unexpected entry of the United States into this litigation, as well as its attempt to expand the issues before the District Court. Respondent, however, refused their request to certify his orders for interlocutory appeal pursuant to 28 U. S. C. § 1292 (b). Petitioners thereupon brought the instant action pursuant to the All Writs Act, 28 U. S. C. § 1651 (a), contending that respondent had so exceeded his authority as to warrant issuance of a writ of mandamus. The Court of Appeals rejected petitioners' request for this relief in

opinions which indicated that the three members of the panel had divergent views on the issues before it.

While each of the three judges of the Court of Appeals had a somewhat different view as to why petitioners should not obtain the relief they requested, it seems fair to say that the lowest common denominator of these views was an assumption on the court's part that even if respondent's orders were wholly unauthorized by law, they could not be reviewed by a writ of mandamus. I think this assumption incorrect. And I believe that respondent's actions in this litigation raise issues of sufficient moment, regarding both the relationship between the Federal Judiciary and the Executive Branch of the Federal Government and that between the Federal Judiciary and the States, that the Court of Appeals' conclusion that mandamus should not issue warrants plenary review here.

The effect of the actions of respondent is to pit the United States, as a virtually involuntary coplaintiff, alongside the inmate plaintiffs and against petitioner correctional officials. I think it extremely doubtful there is any authority for those actions. Federal Rule Civ. Proc. 24 (b), upon which respondent relied, requires that a would-be intervenor have at a minimum some "claim" having "a question of law or fact in common" with the action sought to be joined. But the United States surely has no claim of its own under the Fourteenth Amendment which it may assert against petitioners, and the rather pallid brief of the United States in opposition to certiorari is discreetly silent as to the source of any such "claim." Title 42 U. S. C. § 2000h–2 (1970 ed., Supp. IV), which authorizes intervention by the Attorney General in an action seeking relief from the denial of equal protection of the laws "on account of race, color, religion, sex or national origin . . . ," clearly affords no basis for intervention by the Gov-

ernment on the pleadings before the District Court. The Solicitor General's brief also refers to the fact that the United States has statutory responsibility for enforcing 18 U. S. C. §§ 241 and 242, "the criminal counterpart to 42 U. S. C. § 1983," but it would seem unlikely that respondent or any other district judge could grant intervention for the reason that the proposed intervenor wished later to institute criminal proceedings against one of the parties to a civil action. In its memorandum in support of its motion to intervene in the District Court, the United States urged that it had "inherent standing to sue to enjoin widespread and severe deprivations of constitutional rights. *In re Debs,* 158 U. S. 564 (1895)." If *Debs,* which held that a federal court had authority to issue an injunction against an armed conspiracy that threatened the interstate transportation of the mails, is to be extended to the situation presented by this case, I think the decision to do so should be made by this Court.

In short, the legal assumptions on which the District Court acted involve serious and far-reaching questions which have certainly not been settled by any decision of this Court. And since the relief sought by the inmate plaintiffs in *Ruiz,* if awarded at all, will run to the individual prisoners, petitioners will be unable to assert any separate claim of error in an appeal from that judgment by reason of the respondent's orders allowing intervention by the United States. There is a substantial probability, therefore, that the issue here presented will escape review at any other time, and that mandamus is "the only means of forestalling [the] intrusion of the federal judiciary" complained of by petitioners. *Will* v. *United States,* 389 U. S. 90, 95 (1967); *Maryland* v. *Soper,* 270 U. S. 9 (1926). If there was no legal basis for the respondent to grant intervention on the part of the United States, use of the writ of mandamus in this case would come squarely within its "traditional use . . .

confin[ing] an inferior court to a lawful exercise of its prescribed jurisdiction" *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943), for respondent's action would fall into the category of "usurpation of power" against which mandamus is classically available. *De Beers Mines, Ltd.* v. *United States*, 325 U. S. 212, 217 (1945).

Over and beyond these factors, which govern availability of mandamus in private litigation, this case raises issues involving the "delicate area of federal-state relations," *Will* v. *United States, supra*, at 95, in which mandamus must be more readily available in other civil litigations. *Ibid.*; *Maryland* v. *Soper, supra*, at 29. And, perhaps most importantly of all, the Court of Appeals indicated in its opinion, *In re Estelle*, 516 F. 2d 480, 487 n. 5 (1975), that intervention by the United States in situations similar to that presented here has been authorized by a number of District Courts in the Fifth Circuit. There is good reason to believe, therefore, that orders such as those entered by respondent in this case will be entered by other District Judges in that Circuit in the future. If this be an improper exercise of their authority, the prospect of its being repeated makes mandamus particularly appropriate. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957).

I would grant the writ of certiorari.

No. 75–6300. GARDUNO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari.

Rehearing Denied

No. 75–6155. HICKS *v.* UNITED STATES, 425 U. S. 953;

No. 75–6325. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL., 425 U. S. 942; and

No. 75–6397. LYON *v.* CALIFORNIA, 425 U. S. 962. Petitions for rehearing denied.

JUNE 10, 1976

Miscellaneous Orders

No. A–1075. BOARD OF EDUCATION OF THE CITY OF ELIZABETH, NEW JERSEY *v.* BYRNE, GOVERNOR OF NEW JERSEY, ET AL. Application for stay of judgment of the Supreme Court of New Jersey, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 70 N. J. 155, 358 A. 2d 457.

No. A–1079. WEBB ET AL. *v.* LOHR, JUDGE. Sup. Ct. Colo. Application for preliminary injunction and/or stay of order entered by respondent on June 2, 1976 [in *People* v. *Longet*], presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

JUNE 14, 1976

Appeals Dismissed

No. 75–1561. CHULA VISTA ELECTRIC CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 53 Cal. App. 3d 445, 125 Cal. Rptr. 827.

No. 75–1580. MCVEA ET AL. *v.* BOARD OF DIRECTORS OF THE FEDERAL INTERMEDIATE CREDIT BANK. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 325 So. 2d 608.

No. 75–1569. ARIZONA PUBLIC SERVICE CO. *v.* ARIZONA ET AL. Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. 28 U. S. C. § 2101 (c). Reported below: 24 Ariz. App. 601, 540 P. 2d 727.

Certiorari Granted—Vacated and Remanded. (See also No. 75–1504, *ante*, p. 479.)

No. 74–116. PLACE *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., 419 U. S. 1040. Petition for rehearing granted and order of November 25, 1974, denying petition for writ of certiorari, vacated. Certiorari granted, judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Brown* v. *General Services Administration*, 425 U. S. 820, 824 n. 4 (1976). MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

No. 74–851. SEEBER, GENERAL MANAGER, TENNESSEE VALLEY AUTHORITY, ET AL. *v.* ALABAMA ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hancock* v. *Train*, *ante*, p. 167. Reported below: 502 F. 2d 1238.

Miscellaneous Orders

No. 75–811. SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ET AL. *v.* PALMORE ET AL.; and SWAIN, REFORMATORY SUPERINTENDENT *v.* PRESSLEY. C. A. D. C. Cir. [Certiorari granted, 424 U. S. 907.] Motion of respondents for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument.

No. 75–567. OREGON EX REL. STATE LAND BOARD *v.* CORVALLIS SAND & GRAVEL CO.; and

No. 75–577. CORVALLIS SAND & GRAVEL CO. *v.* OREGON EX REL. STATE LAND BOARD. Sup. Ct. Ore. [Certiorari granted, 423 U. S. 1048.] Renewed motion of the Attorney General of California et al. for leave to participate in oral argument as *amici curiae* denied.

No. 75–1064. KREMENS, HOSPITAL DIRECTOR, ET AL. *v.* BARTLEY ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 424 U. S. 964.] Motion of appellees for leave to proceed further herein *in forma pauperis* granted.

No. 75–1150. CITY OF PHILADELPHIA ET AL. *v.* NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. [Probable jurisdiction noted, 425 U. S. 910.] Motion of American Society of Civil Engineers for leave to file a brief as *amicus curiae* granted.

No. 75–1532. HECHINGER ET AL. *v.* MARTIN, CHAIRMAN, DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, ET AL. Appeal from D. C. D. C. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–6787. MAYOLA *v.* ALABAMA. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 75–1301. DELAWARE TRIBAL BUSINESS COMMITTEE ET AL. *v.* WEEKS ET AL.;

No. 75–1335. ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE ET AL. *v.* WEEKS ET AL.; and

No. 75–1495. KLEPPE, SECRETARY OF THE INTERIOR, ET AL. *v.* WEEKS ET AL. Appeals from D. C. W. D. Okla. Probable jurisdiction noted, cases consolidated, and a total of one and one-half hours allotted for oral argument. In case No. 75–1335, the parties are invited to address particularly questions 1, 4, and 9 presented by the jurisdictional statement. Reported below: 406 F. Supp. 1309.

Certiorari Granted

No. 75–1552. CASTANEDA, SHERIFF *v.* PARTIDA. C. A. 5th Cir. Certiorari granted. Reported below: 524 F. 2d 481.

No. 75–6521. ABNEY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 530 F. 2d 963.

Certiorari Denied. (See also Nos. 75–1561 and 75–1580, *supra.*)

No. 74–476. PENN ET AL. *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 970.

No. 75–734. SMITH ET AL. *v.* TROYAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 520 F. 2d 492.

No. 75–1000. BOIRE, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD *v.* PILOT FREIGHT CARRIERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1185.

No. 75–1200. NIMS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 123.

No. 75–1275. STAR ET AL. *v.* BENTON, DIRECTOR OF FINANCE OF BALTIMORE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 970.

No. 75–1277. A. L. BURBANK & CO., LTD., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 9.

No. 75–1293. EDWARDS *v.* REED, SECRETARY OF THE AIR FORCE. C. A. 6th Cir. Certiorari denied.

No. 75–1377. BONACORSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 528 F. 2d 1218.

No. 75–1378. COSBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 143.

No. 75–1414. DONNELLY ADVERTISING CORPORATION OF FLORIDA ET AL. *v.* CITY OF MIAMI ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–1435. PASCHALL, EXECUTRIX, ET AL. *v.* CHRISTIE-STEWART, INC., ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 544 P. 2d 505.

No. 75–1438. VANCE *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 75–1441. WHITE, MAYOR OF BOSTON *v.* MORGAN ET AL.;

No. 75–1445. McDONOUGH ET AL. *v.* MORGAN ET AL.;

No. 75–1466. BOSTON HOME AND SCHOOL ASSN. *v.* MORGAN ET AL.; and

No. 75–1527. DOHERTY ET AL. *v.* MORGAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 401 (first, second, and third cases); 530 F. 2d 431 (fourth case).

No. 75–1507. SLOAN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 11.

No. 75–1518. PEPI, INC., ET AL. *v.* PITCHFORD ET AL.; and

No. 75–1579. PITCHFORD ET AL. *v.* PEPI, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 531 F. 2d 92.

No. 75–1512. FRIERSON ET AL. *v.* WEST, GOVERNOR OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 75–1519. FAHEY *v.* HOLY FAMILY HOSPITAL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 32 Ill. App. 3d 537, 336 N. E. 2d 309.

No. 75–1523. KARR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 44 Ohio St. 2d 163, 339 N. E. 2d 641.

No. 75–1524. TRUSTEES OF READING BODY WORKS, INC., ET AL. *v.* SECURITIES INVESTOR PROTECTION CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 1314.

No. 75–1525. NEREUS SHIPPING, S. A. *v.* COMPANIA ESPANOLA DE PETROLEOS, S. A., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 966.

No. 75–1546. KNIGHT *v.* HOLDER ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 324 So. 2d 765.

No. 75–1549. SINCLAIR ET AL. *v.* WILLIAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 1383.

No. 75–1595. LUBOW *v.* HOLLANDER ET AL. Ct. App. Md. Certiorari denied. Reported below: 277 Md. 47, 351 A. 2d 421.

No. 75–1648. DEERING MILLIKEN RESEARCH CORP. *v.* BEAUNIT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 1022.

No. 75–6346. GENTILE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 530 F. 2d 461.

No. 75–6349. CAMPBELL *v.* COUSINS, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 925.

No. 75–6360. KONIGSBERG *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 131.

No. 75–6380. AYERS *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 524.

No. 75–6385. LIDDY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 242, 530 F. 2d 1094.

No. 75–6395. WOFFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–6408. GARTON *v.* NORTHERN PACIFIC RAILWAY CO. Sup. Ct. Wash. Certiorari denied.

No. 75–6435. CLARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 517.

No. 75–6439. HART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 344.

No. 75–6441. BOTTOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6456. SHARPE *v.* JONES, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1250.

No. 75–6458. CORNISH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 961.

No. 75–6462. BEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 851.

No. 75–6463. POPE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6466. SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 1405.

No. 75–6467. BARFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 926.

No. 75–6478. HARLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 535 F. 2d 1251.

No. 75–6484. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75–6490. ESCOBAR-ORDONEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 969.

No. 75–6491. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 752.

No. 75–6510. CAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6516. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6525. EX PARTE TYLER. C. A. 8th Cir. Certiorari denied.

No. 75–6531. BETTKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 926.

No. 75–6550. EARL ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 1145.

No. 75–6565. JOHNSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75–6572. INGENITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 531 F. 2d 1174.

No. 75–6598. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 590.

No. 75–6629. TRUSLEY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75–6630. STANDLEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 75–6634. MORGAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 75–6635. CLARK *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 218 Kan. 726, 544 P. 2d 1372.

No. 75–6647. HARRISON ET AL. *v.* CRISP, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 75–6650. BROWN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 265 S. C. 516, 220 S. E. 2d 125.

No. 75–6654. HORAN *v.* NEALON ET AL. Ct. App. D. C. Certiorari denied.

No. 75–6658. BULLOCK *v.* CUYLER, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 966.

No. 75–6659. DELEE *v.* KNIGHT, SHERIFF, ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 266 S. C. 103, 221 S. E. 2d 844.

209-904 O - 78 - 61

No. 75–6661. TREFTZ *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 465 Pa. 614, 351 A. 2d 265.

No. 75–6664. BENNETT ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 546 P. 2d 659.

No. 75–6666. HOHENSEE ET AL. *v.* GRIER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1403.

No. 75–6669. MITCHELL *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 115 N. H. 720, 349 A. 2d 862.

No. 75–6673. PALMER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1231.

No. 75–6678. MORGAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 75–6679. ROBERTS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–6697. STARR *v.* GORSKI, EXECUTRIX. C. A. 3d Cir. Certiorari denied. Reported below: 527 F. 2d 645.

No. 75–6698. BALL *v.* SHAMBLIN. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 520.

No. 75–6711. WHITE *v.* SUPERIOR COURT OF ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 75–1026. TYLER ET AL. *v.* VICKERY ET AL. C. A. 5th Cir. Motion of Atlanta Legal Aid Society, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 517 F. 2d 1089.

No. 75–1289. California Co., a Division of Chevron Oil Co. *v.* Federal Power Commission;

No. 75–1299. Shell Oil Co. et al. *v.* Federal Power Commission;

No. 75–1304. American Public Gas Assn. *v.* Federal Power Commission;

No. 75–1305. Public Service Commission of New York *v.* Federal Power Commission;

No. 75–1308. Associated Gas Distributors *v.* Federal Power Commission; and

No. 75–1474. Superior Oil Co. *v.* Federal Power Commission. C. A. 5th Cir. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of these petitions. Reported below: 520 F. 2d 1061.

No. 75–1503. Texaco Inc. et al. *v.* Federal Energy Administration et al. Temp. Emerg. Ct. App. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 531 F. 2d 1071.

No. 75–1602. E. I. du Pont de Nemours & Co. et al. *v.* Environmental Protection Agency;

No. 75–1612. Ethyl Corp. *v.* Environmental Protection Agency;

No. 75–1613. Nalco Chemical Co. *v.* Environmental Protection Agency; and

No. 75–1614. National Petroleum Refiners Assn. *v.* Environmental Protection Agency. C. A. D. C. Cir. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* denied. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this motion and petitions. Reported below: 176 U. S. App. D. C. 373, 541 F. 2d 1.

No. 75–1480. BANNERT *v.* AMERICAN CAN CO. C. A. 6th Cir. Motion for leave to file an amended petition for writ of certiorari granted. Certiorari denied. Reported below: 525 F. 2d 104.

No. 75–1653. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL *v.* NORTHWEST AIRLINES, INC. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 174 U. S. App. D. C. 196, 530 F. 2d 1048.

Rehearing Granted. (See No. 74–116, *supra.*)

Rehearing Denied

No. 75–805. CIVIL SERVICE COMMISSION OF NEW YORK ET AL. *v.* SNEAD, 425 U. S. 457;

No. 75–898. SUTHERLAND ET AL. *v.* ILLINOIS, 425 U. S. 947;

No. 75–1210. QUARLES, TRUSTEE *v.* GOODSON ET AL., 425 U. S. 928;

No. 75–1321. CRAWFORD ET UX. *v.* SECURITY NATIONAL BANK, 425 U. S. 959; and

No. 75–1322. BELCHER *v.* ALABAMA, 425 U. S. 952. Petitions for rehearing denied.

JUNE 16, 1976

Dismissal Under Rule 60

No. 75–5929. BERRÍOS *v.* INTER AMERICAN UNIVERSITY ET AL. Appeal from D. C. P. R. dismissed under this Court's Rule 60. Reported below: 409 F. Supp. 769.

JUNE 21, 1976

Dismissal Under Rule 60

No. 75–6742. HOUSER *v.* SEALS, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus dismissed under this Court's Rule 60.

Affirmed on Appeal

No. 75–1476. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. E. D. Pa. Reported below: 403 F. Supp. 1327.

No. 75–1550. VORBECK ET AL. *v.* MCNEAL ET AL. Affirmed on appeal from D. C. E. D. Mo. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 407 F. Supp. 733.

Appeals Dismissed

No. 75–1326. VICE *v.* FERGUSON ET AL. Appeal from Sup. Ct. Miss. dismissed for want of properly presented federal question. MR. JUSTICE BLACKMUN would dismiss appeal for want of substantial federal question. Reported below: 322 So. 2d 760.

No. 75–1553. UNITED STATES POWER SQUADRONS ET AL. *v.* HINDEN ET AL. Appeal from Super. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75–1592. DAVIS *v.* DAVIS. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 306 Minn. 536, 235 N. W. 2d 836.

No. 75–1649. FARNUM *v.* COMMITTEE ON CHARACTER AND FITNESS, SUPREME COURT OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 74–1499. ENOMOTO, CORRECTIONS DIRECTOR, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (WRIGHT ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kerr* v. *United States District Court for the Northern District of California, ante,* p. 394.

No. 75–969. S. D. COHN & CO. ET AL. *v.* WOOLF ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *TSC Industries, Inc.* v. *Northway, Inc., ante,* p. 438. Reported below: 515 F. 2d 591.

No. 75–1481. STOVER ET AL. *v.* CHICANO POLICE OFFICERS ASSN. ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Washington* v. *Davis, ante,* p. 229. Reported below: 526 F. 2d 431.

Certificate Dismissed

No. 75–1728. ATKINS, U. S. DISTRICT JUDGE, ET AL. *v.* UNITED STATES. Certificate from the United States Court of Claims dismissed. MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS would accept the certificate.

Miscellaneous Orders

No. A–1017. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Application for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 74–1106. UNITED STATES *v.* WASHINGTON. Ct. App. D. C. [Certiorari granted, *ante,* p. 905.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 75–1002. JOSEPH SKILKEN & CO. ET AL. *v.* CITY OF TOLEDO ET AL. C. A. 6th Cir. Motion of petitioners to grant certiorari and set case for oral argument with *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.* [certiorari granted, 423 U. S. 1030] denied.

No. 75–1064. KREMENS, HOSPITAL DIRECTOR, ET AL. *v.* BARTLEY ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 424 U. S. 964.] Motion of the Supreme Court of Pennsylvania for leave to file a brief as *amicus curiae* denied.

No. 75–1261. BUTZ, SECRETARY OF AGRICULTURE *v.* HEIN ET AL.; and

No. 75–1355. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* HEIN ET AL. Appeals from D. C. S. D. Iowa. [Probable jurisdiction noted, *ante*, p. 904.] Motion for appointment of counsel granted and Robert Bartels, Esquire, of Iowa City, Iowa, is appointed pursuant to this Court's Rule 53 (7) to serve as counsel for appellee Hein in these cases.

No. 75–1450. DEPARTMENT OF SOCIAL SERVICES OF IOWA *v.* WEST HEIGHT MANOR, INC.; and BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* HUTCHISON NURSING HOME, INC., ET AL. Sup. Ct. Iowa. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–1583. MORRIS ET AL. *v.* GRESSETTE, PRESIDENT PRO TEM, SOUTH CAROLINA SENATE, ET AL. Appeal from D. C. S. C. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–6511. SAHLEY *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 75–6289. MOORE *v.* CITY OF EAST CLEVELAND. Appeal from Court of Appeals of Ohio, Cuyohoga County. [Probable jurisdiction noted, 425 U. S. 949.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted, provided brief is filed within time allowed for filing of brief of party supported.

No. 75–1566. CASE *v.* COMMISSIONER OF PATENTS AND TRADEMARKS ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 75–1318. PEARSON *v.* DODD ET AL. Appeal from Sup. Ct. App. W. Va. Probable jurisdiction noted. Reported below: —— W. Va. ——, 221 S. E. 2d 171.

No. 75–1397. JUIDICE ET AL., JUDGES *v.* VAIL ET AL. Appeal from D. C. S. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 406 F. Supp. 951.

No. 75–1453. WOOLEY, CHIEF OF POLICE OF LEBANON, ET AL. *v.* MAYNARD ET UX. Appeal from D. C. N. H. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 406 F. Supp. 1381.

Certiorari Granted

No. 75–1439. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted.

No. 75–1510. WEATHERFORD, AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, ET AL. *v.* BURSEY. C. A. 4th Cir. Certiorari granted. Reported below: 528 F. 2d 483.

No. 75–1473. E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; and

No. 75–1705. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* E. I. DU PONT DE NEMOURS & CO. ET AL. C. A. 4th Cir. Motion to consolidate these cases with No. 75–978 [*E. I. du Pont de Nemours & Co.* v. *Train, Administrator, Environmental Protection Agency,* certiorari granted, 425 U. S. 933] denied. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Cases set for oral argument with No. 75–978. Reported below: 541 F. 2d 1018.

Certiorari Denied. (See also Nos. 75–1553, 75–1592, and 75–1649, *supra.*)

No. 75–974. WEST PENN POWER CO. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 522 F. 2d 302.

No. 75–1170. KEHRLI *v.* SPRINKLE. C. A. 10th Cir. Certiorari denied. Reported below: 524 F. 2d 328.

No. 75–1217. BIRTLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–1230. CITIES SERVICE CO. ET AL. *v.* FEDERAL ENERGY ADMINISTRATION ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 529 F. 2d 1016.

No. 75–1259. MARATHON OIL CO. *v.* FEDERAL ENERGY ADMINISTRATION ET AL. Temp. Emerg. Ct. App. Certiorari denied.

No. 75–1310. ESSER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 520 F. 2d 213.

No. 75–1313. COLLINS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 236 N. W. 2d 376.

No. 75–1315. LINDSEY ET AL. *v.* LOUISIANA THROUGH THE SABINE RIVER AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 934.

No. 75–1317. ZARKOS ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (RIGGS, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–1353. BURLESON *v.* FRIEDLI ET AL. Ct. App. D. C. Certiorari denied.

No. 75–1363. ALESSIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 1079.

No. 75–1365. WHEELER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 311 So. 2d 713.

No. 75–1366. GARNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–1372. MULES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 752.

No. 75–1379. MEYER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 72.

No. 75–1389. FINFROCK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 979.

No. 75–1396. ROCHELLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 844 and 526 F. 2d 405.

No. 75–1399. WARIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 103.

No. 75–1400. PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 1356.

No. 75–1436. OIL SHALE CORP. ET AL. *v.* KLEPPE, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied.

No. 75–1458. ROBERTS *v.* OHIO. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 75–1471. CIVIC TELECASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 173 U. S. App. D. C. 236, 523 F. 2d 1185.

No. 75–1509. PHILLIPS *v.* FORD, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 77, 527 F. 2d 1386.

No. 75–1563. AHLMAN ET UX. *v.* DURBIN ET AL. Sup. Ct. Ky. Certiorari denied.

No. 75–1570. KANSAS *v.* FARHA ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 218 Kan. 394, 544 P. 2d 341.

No. 75–1573. RICHARDS *v.* HOWARD UNIVERSITY ET AL. Ct. App. D. C. Certiorari denied.

No. 75–1589. ALCOR AVIATION, INC. *v.* RADAIR, INC. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 113.

No. 75–1601. GOODMAN ET AL. *v.* LIZZA & SONS, INC., ET AL. Super. Ct. N. J. Certiorari denied.

No. 75–1603. DITLOW *v.* PAN AMERICAN WORLD AIRWAYS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 75–1607. LACKAWANNA POWER SQUADRON ET AL. *v.* HINDEN ET AL. Sup. Ct. N. J. Certiorari denied.

No. 75–1617. RILEY ET AL. *v.* STEPHENS ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 75–1655. LAGORIO *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 1290.

No. 75–1668. INCORPORATED VILLAGE OF ROSLYN HARBOR ET AL. *v.* JEWISH RECONSTRUCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC. Ct. App. N. Y. Certiorari denied. Reported below: 38 N. Y. 2d 283, 342 N. E. 2d 534.

No. 75–6246. DUNN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 31 Ill. App. 3d 854, 334 N. E. 2d 866.

No. 75–6272. COLE, AKA KOL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 75–6364. REESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1395.

No. 75–6401. WALKER *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 306 Minn. 105, 235 N. W. 2d 810.

No. 75–6424. DIGIANGIEMO *v.* OLGIATTI, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 528 F. 2d 1262.

No. 75–6431. GREEN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 75–6434. GILL *v.* CUPP, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 75–6446. DUVALL *v.* UNITED STATES; and
No. 75–6468. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 15.

No. 75–6449. O'MEALLY *v.* UNITED STATES; and No. 75–6470. MAYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75–6464. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 980.

No. 75–6471. JEWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 697.

No. 75–6480. BRYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1230.

No. 75–6481. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 926.

No. 75–6483. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–6493. HUNTER, AKA PETERS, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75–6503. BOLTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75–6504. BRANT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–6505. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75–6507. PATRICK *v.* UNITED STATES; and No. 75–6512. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–6508. GLOVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 521.

No. 75–6513. POFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6514. AUSTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 297.

No. 75–6517. RAYMOND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 966.

No. 75–6518. RICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 521.

No. 75–6519. ZAMORA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6530. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 532 F. 2d 748.

No. 75–6539. BELINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 521.

No. 75–6546. SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 580.

No. 75–6547. ZAMUDIO-AGUILAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6564. DUKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 527 F. 2d 386.

No. 75–6567. PIPKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 559.

No. 75–6570. OAKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 937.

No. 75–6576. HOFFMAN *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 75–6579. SHEA *v.* ROUDEBUSH, ADMINISTRATOR, VETERANS' ADMINISTRATION. C. A. 9th Cir. Certiorari denied.

No. 75–6588. COOLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6609. MILLANES-RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 65–6671. MITCHELL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 39 N. Y. 2d 173, 347 N. E. 2d 607.

No. 75–6674. MORSE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 33 Ill. App. 3d 384, 342 N. E. 2d 307.

No. 75–6690. STOKES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–6692. PILCHER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 623.

No. 75–6696. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 34 Ill. App. 3d 103, 339 N. E. 2d 485.

No. 75–6704. GONZALES *v.* ISRAEL. C. A. 7th Cir. Certiorari denied. Reported below: 534 F. 2d 330.

No. 75–6705. TYCZKOWSKI *v.* SKONIECZKA, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 75–6707. BELLEW *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 532 F. 2d 1288.

No. 75–6718. MOORE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 690.

No. 75–6719. JOHNSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–1349. VILLANO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 529 F. 2d 1046.

No. 75–6725. OMERNICK *v.* WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 75–6755. MEADOWS *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 75–1384. ESTELLE, CORRECTIONS DIRECTOR *v.* ALBERTI. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 524 F. 2d 1265.

No. 75–1431. STERN *v.* UNITED STATES ET AL. C. A. 6th Cir. Motion to substitute Emma Louise Gardner, Executrix of Estate of Malcolm P. Gardner, in place of respondent Malcolm P. Gardner, deceased, granted. Certiorari denied. Reported below: 528 F. 2d 715.

No. 75–1582. TOIA, ACTING COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* HOLLEY ET AL. C. A. 2d Cir. Motion of respondents Holley et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 529 F. 2d 1294.

No. 75–6689. STEVENSON *v.* MATHEWS, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 529 F. 2d 61.

Rehearing Denied

No. 74–676. ESTELLE, CORRECTIONS DIRECTOR *v.* WILLIAMS, 425 U. S. 501;

No. 75–130. QUINN, COMMISSIONER, CHICAGO FIRE DEPARTMENT *v.* MUSCARE, 425 U. S. 560;

No. 75–1186. BROMBERG *v.* CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., 425 U. S. 963; and

No. 75–1405. MARSHALL FIELD & CO. *v.* SHOUP, 425 U. S. 981. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

No. 75–110. SAKRAIDA *v.* AG PRO, INC., 425 U. S. 273;
No. 75–1240. RODRIGUEZ ET AL. *v.* UNITED STATES, 425 U. S. 999; and
No. 75–6152. PRESTON, AKA RILLA *v.* GRAY, WARDEN, 425 U. S. 976. Petitions for rehearing denied.

JUNE 23, 1976

Dismissal Under Rule 60

No. 75–6788. HOWELL *v.* MISSISSIPPI STATE PROBATION AND PAROLE BOARD; and BROOKS *v.* MISSISSIPPI STATE PROBATION AND PAROLE BOARD. Sup. Ct. Miss. Certiorari dismissed under this Court's Rule 60. Reported below: 330 So. 2d 565 (first case); 330 So. 2d 567 (second case).

209-904 O - 78 - 62

INDEX

ABANDONED AUTOMOBILES. See **Constitutional Law**, I, 3; IV, 2.

ABATEMENT OF AIR POLLUTION. See **Clean Air Act.**

ABATEMENT OF WATER POLLUTION. See **Federal Water Pollution Control Act**, 1.

ABSTENTION.

Constitutionality of Puerto Rico statute.—In appellee alien civil engineers' action challenging constitutionality of Puerto Rico statute permitting only United States citizens to practice privately as civil engineers, United States District Court in Puerto Rico, upon holding citizenship requirement unconstitutional, correctly determined that abstention was unnecessary, since federal constitutional claim is not complicated by an unresolved state-law question, even though appellees might have sought relief under similar provisions of Puerto Rico Constitution. Examining Board v. Flores de Otero, p. 572.

ACQUISITION OF CORPORATIONS. See **Securities Exchange Act of 1934**, 2–3.

ACTIONS AGAINST AIR CARRIERS. See **Air Carriers.**

ACTIONS AGAINST NATIONAL BANKS. See **Venue.**

ADJUSTMENT OF IMPORTS. See **Trade Expansion Act of 1962.**

ADMINISTRATIVE PROCEDURE. See **Federal Water Pollution Control Act**, 2–3.

AGENCY-SHOP AGREEMENTS. See **National Labor Relations Act.**

AIR CARRIERS.

Common-law tort action for "bumping" of airline passenger—"Deceptive" practice.—Petitioner's common-law tort action based on alleged fraudulent misrepresentation by respondent air carrier arising from its failure to apprise petitioner of its deliberate overbooking practices, should not be stayed pending reference to Civil Aeronautics Board for a determination whether practice is "deceptive" within meaning of § 411 of Federal Aviation Act of 1958. Nader v. Allegheny Airlines, p. 290.

AIR POLLUTION. See **Clean Air Act.**

ALIENS. See **Abstention; Constitutional Law,** III, 5–6; IV, 3; **Jurisdiction,** 1.

AMERICAN ANTIQUITIES PRESERVATION ACT. See **Water Rights.**

ANIMALS. See **Constitutional Law,** VI.

ANTICOMPETITIVE ELECTRIC RATES. See **Federal Power Commission.**

APPEALS.

Court of Appeals—Necessity for cross-appeal.—In a diversity action by respondent administrator against petitioner insurer for recovery under double indemnity provision of a life insurance policy issued in Michigan to respondent's decedent, who was killed in Illinois, Court of Appeals, in reversing District Court's judgment that under Michigan law petitioner was liable only for ordinary benefits, erred in holding that petitioner's failure to cross-appeal precluded it from arguing that Illinois law applied, under which it would be liable only for ordinary benefits. Petitioner's argument was no more than "an attack on the reasoning of the lower court," and as such required no cross-appeal. Massachusetts Mut. Life Ins. Co. v. Ludwig, p. 479.

ATOMIC ENERGY ACT. See **Federal Water Pollution Control Act,** 2–3.

AUTOMOBILE "HULKS." See **Constitutional Law,** I, 3; IV, 2.

"AUXILIARY TELLER" FACILITIES. See **Banks.**

BANKS. See also **Venue.**

"Auxiliary teller" facilities—Authority to operate—Intervening legislation.—Court of Appeals' judgment that petitioner national bank's drive-in/walk-in facility was a branch petitioner was not permitted to operate because a state bank would not be permitted to operate a like facility is vacated and case is remanded for reconsideration, in light of an intervening amendment to statute redefining "auxiliary teller" facilities that state banks may operate. Omaha Nat. Bank v. Nebraskans for Ind. Banking, p. 310.

BOUNDARIES. See also **Constitutional Law,** II; **Procedure.**

Texas and Louisiana—Exceptions to Special Master's report.—Louisiana's exception to portion of Special Master's report that marks boundary line between Louisiana and Texas in Sabine River as it

BOUNDARIES—Continued.

enters into Sabine Lake through "middle pass" rather than in geographic middle of "west pass," is overruled, where Special Master's determination is consistent with this Court's rejection of thalweg doctrine in *Texas* v. *Louisiana*, 410 U. S. 702; and Texas' exceptions to Special Master's delimitation of lateral seaward boundary are overruled, where Special Master, after having correctly concluded that there has never been an *established* offshore boundary between States, correctly applied Convention on Territorial Sea and Contiguous Zone, Arts. 12 and 8 of which clearly require that median line be measured with reference to jetties at mouth of Sabine River. Texas v. Louisiana, p. 465.

"BOUNTIES" FOR DESTRUCTION OF "HULK" AUTOMOBILES. See **Constitutional Law**, I, 3; IV, 2.

"BUMPING" OF AIRLINE PASSENGERS. See **Air Carriers.**

BURDENS ON INTERSTATE COMMERCE. See **Constitutional Law**, I, 3.

BURROS. See **Constitutional Law**, VI.

CARRIERS. See **Air Carriers**; **Interstate Commerce Commission**; **Judicial Review.**

CASE OR CONTROVERSY. See **Standing to Sue.**

CATHOLIC COLLEGES. See **Constitutional Law**, V, 1.

CHECKOFF OF UNION DUES. See **Constitutional Law**, IV, 1.

CHURCH-AFFILIATED COLLEGES. See **Constitutional Law**, V, 1.

CHURCH AND STATE. See **Constitutional Law**, V, 1–3.

CITIZENSHIP REQUIREMENT FOR FEDERAL EMPLOYMENT. See **Constitutional Law**, III, 5.

CITY CHARTERS. See **Constitutional Law**, III, 11.

CITY EMPLOYEES. See **Constitutional Law**, I, 1–2; III, 2–3; IV, 1.

CITY'S REFUSAL TO WITHHOLD UNION DUES FROM EMPLOYEES' PAYCHECKS. See **Constitutional Law**, IV, 1.

CIVIL AERONAUTICS BOARD. See **Air Carriers.**

CIVIL ENGINEERS. See **Abstention**; **Constitutional Law**, IV, 3.

CIVILIAN EMPLOYEES OF NATIONAL GUARD. See **Constitutional Law**, III, 9.

CIVIL RIGHTS. See also **Constitutional Law**, III, 4, 7.

Validity of police recruiting procedures—Statutory standards.—Statutory standards similar to those obtaining under Title VII of Civil Rights Act of 1964 were satisfied in this action challenging, on racial discrimination grounds, constitutionality of District of Columbia Police Department's recruiting procedures, including a written personnel test. District Court's conclusion that personnel test was directly related to requirements of police training program and that a positive relationship between test and that program was sufficient to validate test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on record, and no remand to establish further validation is appropriate. Washington v. Davis, p. 229.

CIVIL RIGHTS ACT OF 1871. See **Constitutional Law**, IV, 3; **Jurisdiction**, 2.

CIVIL RIGHTS ACT OF 1964. See **Civil Rights**; **Constitutional Law**, III, 7.

CIVIL SERVICE COMMISSION. See **Constitutional Law**, III, 5.

CLASSIFICATIONS BASED ON ALIENAGE. See **Constitutional Law**, IV, 3.

CLEAN AIR ACT.

Federally approved state implementation plan—Federal installations—Necessity for state permit.—Although § 118 of Act obligates federal installations discharging air pollutants to join with nonfederal facilities in complying with state "requirements respecting control and abatement of air pollution," obtaining a permit from a State with a federally approved implementation plan is not among such requirements. Hancock v. Train, p. 167.

COLLEGES. See **Constitutional Law**, V, 1.

COMMERCE CLAUSE. See **Constitutional Law**, I.

COMMON-LAW TORT ACTIONS. See **Air Carriers.**

COMMUTERS' TAXES. See **States.**

COMPACT CLAUSE. See **Constitutional Law**, II.

CONDITIONS PRECEDENT FOR RAILROAD RATE INCREASES. See **Interstate Commerce Commission.**

CONFLICT OF LAWS. See **Appeals.**

CONGRESSIONAL POWER See **Constitutional Law**, VI.

CONSENT DECREES. See **Constitutional Law**, II; **Procedure.**

CONSTITUTIONAL LAW. See also **Abstention; Civil Rights; Jurisdiction; Post-conviction Relief; Standing to Sue.**

I. Commerce Clause.

1. *Congress' authority—Extension of Fair Labor Standards Act to state employees.*—Insofar as 1974 amendments to Fair Labor Standards Act extending minimum wage and maximum hour provisions to almost all employees of States and their political subdivisions operate directly to displace States' abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention, police protection, sanitation, public health, and parks and recreation, they are not within authority granted Congress by Commerce Clause. National League of Cities v. Usery, p. 833.

2. *Congress' authority—States' integral governmental functions.*—Congress may not exercise its power to regulate commerce so as to force directly upon States its choices as to how essential decisions regarding conduct of integral governmental functions are to be made. National League of Cities v. Usery, p. 833.

3. *Out-of-state scrap processors—Title documentation of abandoned automobiles.*—Amendment to Maryland "abandoned automobile" statute so as to require out-of-state scrap processors to submit either a certificate of title to an abandoned automobile, a police certificate vesting title, or a bill of sale from a police auction in order to receive a "bounty" from State for destruction of automobile, does not constitute an impermissible burden on interstate commerce in violation of Commerce Clause. Hughes v. Alexandria Scrap Corp., p. 794.

II. Compact Clause.

Original action—State boundaries—Consent decree.—In an original action by New Hampshire against Maine to locate certain lateral marine boundary separating States, adoption of proposed consent decree embodying States' agreement upon meaning of terms of decree does not involve a compact under Art. I, § 10, cl. 3, requiring consent of Congress. Here litigant States are not adjusting boundary between them, which was fixed by King George II's 1740 decree; consent decree simply locates precisely already existing boundary, and neither State is enhancing its power and threatening supremacy of Federal Government. New Hampshire v. Maine, p. 363.

III. Due Process.

1. *Accused's silence at time of arrest—Use for impeachment purposes.*—Use for impeachment purposes of petitioners' silence, at time of arrest and after they received warnings in line with *Miranda* v. *Arizona*, 384 U. S. 436, violated Due Process Clause of Fourteenth

CONSTITUTIONAL LAW—Continued.

Amendment. Post-arrest silence following such warnings is insolubly ambiguous; moreover, it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured, by *Miranda* warnings, that silence would carry no penalty. Doyle v. Ohio, p. 610.

2. *Discharge of policeman—Liberty interest.*—Assuming that explanation given to petitioner policeman privately by respondent City Manager for petitioner's discharge was false, as this Court must do since summary judgment was entered against petitioner, such false explanation did not deprive petitioner of an interest in liberty protected by Due Process Clause of Fourteenth Amendment. Bishop v. Wood, p. 341.

3. *Discharge of policeman—Property interest.*—Under District Court's tenable view of state law that petitioner "held his position at the will and pleasure of the city" (which view was upheld by Court of Appeals and will be accepted by this Court in absence of any authoritative state-court interpretation of ordinance involved providing that a permanent city employee, such as petitioner, may be discharged if he fails to perform work up to standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties) petitioner's discharge without a hearing did not deprive him of a property interest protected by Due Process Clause of Fourteenth Amendment. Bishop v. Wood, p. 341.

4. *Fifth Amendment—Equal protection component—Invidious discrimination.*—Though Due Process Clause of Fifth Amendment contains an equal protection component prohibiting Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional *solely* because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. Washington v. Davis, p. 229.

5. *Fifth Amendment—Exclusion of noncitizens from federal employment.*—Civil Service Commission regulation barring noncitizens, including lawfully admitted resident aliens, from employment in federal competitive civil service, is unconstitutional as depriving such resident aliens of liberty without due process of law in violation of Fifth Amendment. Hampton v. Mow Sun Wong, p. 88.

6. *Fifth Amendment—Medicare requirements for aliens.*—Statutory classification in 42 U. S. C. § 1395 (2) (B), which denies to aliens eligibility for enrollment in Medicare supplemental medical insurance program unless they have been admitted for permanent residence and also have resided in United States for at least five years, does not deprive appellee aliens, who did not meet statutory requirements, of

CONSTITUTIONAL LAW—Continued.

liberty or property in violation of Due Process Clause of Fifth Amendment. Mathews v. Diaz, p. 67.

7. *Fifth Amendment—Police recruiting procedures—Racial discrimination.*—In action against petitioner District of Columbia officials and others by respondent Negroes, whose applications to become District of Columbia police officers were rejected, wherein it was claimed that Police Department's recruiting procedures, including a written personnel test, were racially discriminatory and violated Due Process Clause of Fifth Amendment, Court of Appeals, in reversing District Court's grant of summary judgment for petitioners and directing summary judgment for respondents, erred in resolving Fifth Amendment issue by applying standards applicable to cases under Title VII of Civil Rights Act of 1964. Washington v. Davis, p. 229.

8. *Inadequate notice of offense—Involuntary guilty plea.*—Since respondent, who by agreement with prosecution and on counsel's advice pleaded guilty to second-degree murder without being advised by counsel or state trial court that an intent to cause death was an essential element of second-degree murder, did not receive adequate notice of offense to which he pleaded guilty, his plea was involuntary and judgment of conviction was entered without due process of law. Henderson v. Morgan, p. 637.

9. *Termination of National Guard technician's employment.*—Where respondent's employment as a National Guard technician was terminated under 32 U. S. C. § 709 (e) when he was separated from Guard upon expiration of his enlistment, § 709 (e)(3)'s requirement of "cause" for termination has no application, and hence § 709 (e)(3) cannot provide foundation for a claim that termination of respondent's employment and allegedly arbitrary refusal to re-enlist him violated due process. Tennessee v. Dunlap, p. 312.

10. *Termination of striking teachers' employment—School Board's authority.*—Due Process Clause of Fourteenth Amendment did not guarantee respondent teachers (who had gone on strike in direct violation of Wisconsin law, and whose employment was terminated by petitioner School Board after individual disciplinary hearings) that decision to terminate their employment would be made or reviewed by a body other than School Board. Hortonville Dist. v. Hortonville Ed. Assn., p. 482.

11. *Zoning change—Required approval by referendum.*—City charter amendment requiring that any changes in land use agreed to by city council be approved by a 55% vote in a referendum, does not violate due process rights of a landowner who applies for a zoning

CONSTITUTIONAL LAW—Continued.

change. A referendum, which is a means for direct political participation by people, allowing them what amounts to a veto power over legislative enactments, cannot be characterized as a delegation of power. In establishing legislative bodies, people can reserve to themselves power to deal directly with matters that might otherwise be assigned to legislature, and here power of referendum was specifically reserved to people under Ohio Constitution. Eastlake v. Forest City Enterprises, Inc., p. 668.

IV. Equal Protection of the Laws.

1. *City's refusal to withhold union dues from firemen's paychecks.*—Petitioner city's refusal to withhold from paychecks of its firemen dues owing their union, which represents about 351 of 543 uniformed members of fire department, does not violate Equal Protection Clause of Fourteenth Amendment. Such refusal must meet only standard of reasonableness, and this standard is satisfied by city's offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method for avoiding burden of withholding money for all persons or organizations that request a checkoff. City of Charlotte v. Firefighters, p. 283.

2. *Out-of-state scrap processors—Title documentation of abandoned automobiles.*—Amendment of Maryland "abandoned automobile" statute so as to impose on out-of-state scrap processors more stringent title documentation requirements for abandoned automobiles than on Maryland processors in order to receive a "bounty" from State for destruction of automobile, does not deny appellee out-of-state scrap processor equal protection of laws. Amendment's distinction between domestic and foreign scrap processors, complemented by reasonable assumptions that hulks delivered to Maryland processors are likely to have been abandoned in Maryland, and those delivered to non-Maryland processors are likely to have been abandoned outside Maryland, bears a rational relationship to basic statutory purpose of using state funds to clear Maryland's landscape of abandoned automobiles. Hughes v. Alexandria Scrap Corp., p. 794.

3. *Prohibition against alien engineers.*—Puerto Rico's statutory prohibition of an alien's engaging in private practice of engineering deprives appellee alien civil engineers, who were denied licenses under statute to engage in private practice, of "rights, privileges, or immunities secured by the Constitution and laws," within meaning of 42 U. S. C. § 1983. Question whether it is the Fifth Amendment or Fourteenth that protects Puerto Rico residents need not be resolved since, irrespective of which Amendment applies, statutory

CONSTITUTIONAL LAW—Continued.

restriction on ability of aliens to engage in otherwise lawful private practice of civil engineering is plainly unconstitutional. If Fourteenth Amendment applies, Equal Protection Clause nullifies statutory exclusion; whereas, if Fifth Amendment and its Due Process Clause apply, statute's discrimination is so egregious as to violate due process. Examining Board v. Flores de Otero, p. 572.

V. First Amendment.

1. *Establishment Clause—State aid to private colleges.*—District Court's judgment upholding, against contention that it violated Establishment Clause of First Amendment, Maryland statute providing for annual noncategorical grants to private colleges, among them religiously affiliated institutions, subject only to restrictions that funds not be used for "sectarian purposes," is affirmed. Roemer v. Maryland Public Works Bd., p. 736.

2. *Freedom of religion—Judicial interference with hierarchical church.*—Holding of Illinois Supreme Court that removal and defrockment of respondent Bishop by Holy Assembly of Bishops and Holy Synod of Serbian Orthodox Church had to be set aside as "arbitrary" because proceedings against him had not in court's view been conducted in accordance with Church's constitution and penal code, and that Diocesan reorganization was invalid because it exceeded scope of Church's authority to effectuate such changes without Diocesan approval, constituted improper judicial interference with decisions of a hierarchical church and in thus interposing its judgment into matters of ecclesiastical cognizance and polity, court contravened First and Fourteenth Amendments. Serbian Orthodox Diocese v. Milivojevich, p. 696.

3. *Freedom of religion—Judicial interference with hierarchical church.*—Though Illinois Supreme Court did not rely on "fraud, collusion, or arbitrariness" exception to rule requiring recognition by civil courts of decisions by hierarchical tribunals, but rather on purported "neutral principles" for resolving property disputes in reaching its conclusion that Serbian Orthodox Church's reorganization of American-Canadian Diocese into three Dioceses was invalid, that conclusion contravened First and Fourteenth Amendments. Reorganization of Diocese involves solely a matter of internal church government, an issue at core of ecclesiastical affairs. Serbian Orthodox Diocese v. Milivojevich, p. 696.

VI. Property Clause.

Wild Free-roaming Horses and Burros Act—Exercise of congressional power.—As applied to this case, wherein appellees (State of

CONSTITUTIONAL LAW—Continued.

New Mexico, its Livestock Board and director, and purchaser of unbranded burros seized by Board pursuant to New Mexico Estray Law on federal lands and sold at public auction, and whose return to public lands had been sought by Bureau of Land Management) sought injunctive relief and a declaratory judgment that Wild Free-roaming Horses and Burros Act is unconstitutional, Act is a constitutional exercise of congressional power under Property Clause of Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Kleppe v. New Mexico, p. 529.

CONTROL OF AIR POLLUTION. See **Clean Air Act.**

CONTROL OF WATER POLLUTION. See **Federal Water Pollution Control Act,** 1.

CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE. See **Boundaries.**

CORPORATIONS. See **Securities Exchange Act of 1934,** 2–3.

COURTS OF APPEALS. See **Appeals.**

CRIMINAL LAW. See **Constitutional Law,** III, 1, 8.

CROSS-APPEALS. See **Appeals.**

DECEPTIVE PRACTICES BY AIR CARRIERS. See **Air Carriers.**

DELEGATION OF POWER. See **Constitutional Law,** III, 11; **Trade Expansion Act of 1962.**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. See **National Environmental Policy Act of 1969.**

DEVIL'S HOLE. See **Water Rights.**

DISCHARGE OF EMPLOYEES. See **Constitutional Law,** III, 2–3, 9–10.

DISCHARGES OF AIR POLLUTANTS. See **Clean Air Act.**

DISCHARGES OF RADIOACTIVE MATERIALS. See **Federal Water Pollution Control Act,** 2–3.

DISCHARGES OF WATER POLLUTANTS. See **Federal Water Pollution Control Act,** 1.

DISCIPLINARY HEARINGS. See **Constitutional Law,** III, 10.

DISCLOSURE STATEMENTS BY REAL ESTATE DEVELOPERS. See **National Environmental Policy Act of 1969.**

DISCOVERY. See **Mandamus.**

DISCRIMINATION. See **Civil Rights; Constitutional Law,** III, 4, 7; IV, 3.

DISCRIMINATORY ELECTRIC RATES. See **Federal Power Commission.**

DISTRICT COURTS. See **Abstention; Judicial Review; Jurisdiction,** 1–2; **Venue.**

DISTRICT OF COLUMBIA. See **Civil Rights; Constitutional Law,** III, 4, 7.

DIVERSITY ACTIONS. See **Appeals.**

DRIVE-IN/WALK-IN TELLER FACILITIES. See **Banks.**

DUE PROCESS. See **Constitutional Law,** III; IV, 3; **Post-conviction Relief.**

DURATIONAL RESIDENCE REQUIREMENTS FOR MEDICARE. See **Constitutional Law,** III, 6; **Jurisdiction,** 1.

ECCLESIASTICAL AFFAIRS. See **Constitutional Law,** V, 2–3.

ELECTRIC RATE INCREASES. See **Federal Power Commission.**

EMPLOYER AND EMPLOYEES. See **Constitutional Law,** I, 1–2; III, 2–3, 9–10; IV, 1; **National Labor Relations Act.**

ENGINEERS. See **Abstention; Constitutional Law,** IV, 3.

ENVIRONMENTAL IMPACT STATEMENTS. See **National Environmental Policy Act of 1969.**

ENVIRONMENTAL PROTECTION AGENCY. See **Federal Water Pollution Control Act,** 2–3.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** I, 3; III, 4, 7; IV; **Post-conviction Relief.**

ESTABLISHMENT CLAUSE. See **Constitutional Law,** V, 1.

ESTRAYS. See **Constitutional Law,** VI.

EXCEPTIONS TO SPECIAL MASTER'S REPORT. See **Boundaries.**

EXCESSIVE ENTANGLEMENT OF CHURCH AND STATE. See **Constitutional Law,** V, 1.

EXHAUSTION OF ADMINISTRATIVE REMEDIES. See **Jurisdiction,** 1.

FAIR LABOR STANDARDS ACT. See **Constitutional Law,** I, 1–2.

FALSE OR MISLEADING PROXY STATEMENTS. See **Securities Exchange Act of 1934**, 2–3.

FEDERAL AVIATION ACT OF 1958. See **Air Carriers.**

FEDERAL COMPETITIVE CIVIL SERVICE. See **Constitutional Law**, III, 5.

FEDERAL INSTALLATIONS AS SUBJECT TO STATE AIR POLLUTION PERMITS. See **Clean Air Act.**

FEDERAL INSTALLATIONS AS SUBJECT TO STATE WATER POLLUTION PERMITS. See **Federal Water Pollution Control Act**, 1.

FEDERAL LANDS. See **Constitutional Law**, VI.

FEDERAL POWER COMMISSION.

1. *Remedial power—Unreasonable and anticompetitive difference between wholesale and retail electric rates.*—Though Federal Power Act confers jurisdiction on FPC with respect to sale of electric energy at wholesale in interstate commerce, and FPC has no authority to correct an alleged discriminatory relationship between wholesale and retail rates by regulating nonjurisdictional, retail price, § 205 (b) of Act forbids maintenance of any "unreasonable difference in rates" or service "with respect to any . . . sale" subject to FPC's jurisdiction, and a jurisdictional sale is necessarily implicated in charge of respondent wholesale customers of public utility that difference between utility's wholesale and retail rates is unreasonable and anticompetitive. To extent that alleged discrimination is traceable to jurisdictional rate § 205 (b) would apply, and FPC would have remedial power over jurisdictional rate under § 206. FPC v. Conway Corp., p. 271.

2. *Wholesale electric rate increase—Petition to set aside or reduce—Consideration of anticompetitive purpose.*—FPC's jurisdiction to review a petition to set aside or reduce a public utility's wholesale electric rate increase permits consideration of utility's alleged purpose to forestall its customers from competing with it at retail. FPC v. Conway Corp., p. 271.

FEDERAL PRISONERS. See **Post-conviction Relief.**

FEDERAL-STATE RELATIONS. See **Clean Air Act**; **Constitutional Law**, I, 1–2; VI; **Federal Water Pollution Control Act**, 1; **Indians**; **National Labor Relations Act**; **Water Rights.**

FEDERAL WATER POLLUTION CONTROL ACT.

1. *Federally approved state permit program—Federal installations—Necessity for state permit.*—While federal installations dis-

FEDERAL WATER POLLUTION CONTROL ACT—Continued.
charging water pollutants are obliged, under § 313 of FWPCA Amendments of 1972, to comply to same extent as nonfederal facilities with state "requirements respecting control and abatement of pollution," obtaining a permit from a State with a federally approved permit program is not among such requirements. EPA v. California ex rel. State Water Resources Control Board, p. 200.

2. *Meaning of Act—Consideration of legislative history—Regulation of radioactive materials.*—To extent that Court of Appeals excluded reference to Act's legislative history in discerning meaning of Act with respect to whether Act requires Environmental Protection Agency to regulate discharges of all radioactive materials, including those covered by Atomic Energy Act, court was in error, for "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Train v. Colorado Pub. Int. Research Group, p. 1.

3. *"Pollutants" subject to regulation—Nuclear materials covered by Atomic Energy Act.*—FWPCA's legislative history reflects a congressional intention not to alter Atomic Energy Commission's control over discharge of source, byproduct, and special nuclear materials. Therefore, "pollutants" subject to regulation under FWPCA do not include such materials, and Environmental Protection Agency Administrator acted in accordance with his statutory mandate in declining to regulate discharge of these materials. Train v. Colorado Pub. Int. Research Group, p. 1.

FEDERAL WATER RIGHTS. See **Water Rights.**

FIFTH AMENDMENT. See **Constitutional Law**, III, 4–7; IV, 3; **Post-conviction Relief.**

FIREMEN. See **Constitutional Law**, IV, 1.

FIRST AMENDMENT. See **Constitutional Law**, V, 1–3.

FOURTEENTH AMENDMENT. See **Constitutional Law**, I, 3; III, 1–3, 9–11; IV, 1–3; V, 2–3.

FRAUDULENT MISREPRESENTATIONS BY AIR CARRIERS. See **Air Carriers.**

FREEDOM OF RELIGION. See **Constitutional Law**, V, 2–3.

FREE-ROAMING HORSES AND BURROS. See **Constitutional Law**, VI.

FREE TRANSCRIPTS OF CRIMINAL TRIALS. See **Post-conviction Relief.**

FREIGHT RATES. See **Interstate Commerce Commission; Judicial Review.**

GOSPORT HARBOR. See **Constitutional Law,** II; **Procedure.**

GUILTY PLEAS. See **Constitutional Law,** III, 8.

HABEAS CORPUS. See **Post-conviction Relief.**

HIERARCHICAL CHURCHES. See **Constitutional Law,** V, 2–3.

HORSES. See **Constitutional Law,** VI.

HOSPITAL SERVICES FOR INDIGENTS. See **Standing to Sue,** 2.

HOUSING AND URBAN DEVELOPMENT DEPARTMENT. See **National Environmental Policy Act of 1969.**

"HULKS" OF AUTOMOBILES. See **Constitutional Law,** I, 3; IV, 2.

ILLINOIS. See **Constitutional Law,** V, 2–3.

IMPARTIAL DECISIONMAKERS. See **Constitutional Law,** III, 10.

IMPEACHMENT USE OF ACCUSED'S POST-ARREST SILENCE. See **Constitutional Law,** III, 1.

IMPORTS OF OIL. See **Trade Expansion Act of 1962.**

INADEQUATE NOTICE OF OFFENSE. See **Constitutional Law,** III, 8.

IN CAMERA INSPECTION. See **Mandamus.**

INCOME TAXES ON COMMUTERS. See **States.**

INDIANS.

State taxes—Reservation Indians.—Public Law 280, which granted various States with respect to all Indian country within State except as specifically exempted "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action," and, further provided that "those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the State . . . ," did not grant States authority to impose taxes on reservation Indians. Bryan v. Itasca County, p. 373.

INDIGENT PRISONERS. See **Post-conviction Relief.**

INDIGENTS. See **Standing to Sue,** 2.

INOPERABLE AUTOMOBILES. See **Constitutional Law**, I, 3; IV, 2.

INTENT AS ELEMENT OF SECOND-DEGREE MURDER. See **Constitutional Law**, III, 8.

INTERNAL CHURCH GOVERNMENT. See **Constitutional Law**, V, 2–3.

INTERNAL REVENUE CODE. See **Standing to Sue**, 2.

INTERSTATE COMMERCE. See **Constitutional Law**, I, 3; IV, 2.

INTERSTATE COMMERCE COMMISSION. See also **Judicial Review.**

Proposed railroad tariff—Condition precedent.—ICC may, as condition for not suspending and subsequently investigating lawfulness of a proposed tariff, require railroads to devote additional revenues for purposes carriers invoked in support of increase. United States v. Chesapeake & Ohio R. Co., p. 476.

INTERSTATE COMPACTS. See **Constitutional Law**, II.

INTERSTATE ELECTRICITY SALES. See **Federal Power Commission.**

INTERSTATE LAND SALES FULL DISCLOSURE ACT. See **National Environmental Policy Act of 1969.**

INTERVENING LEGISLATION. See **Banks.**

INVIDIOUS DISCRIMINATION. See **Constitutional Law**, III, 4, 7.

INVOLUNTARY GUILTY PLEAS. See **Constitutional Law**, III, 8.

ISLES OF SHOALS. See **Constitutional Law**, II; **Procedure.**

JOB SITUS TEST. See **National Labor Relations Act.**

JUDICIAL INTERFERENCE WITH HIERARCHICAL CHURCHES. See **Constitutional Law**, V, 2–3.

JUDICIAL REVIEW. See also **Jurisdiction**, 1.

Interstate Commerce Commission order—Railroad tariffs—District Court review—Improper reweighing of testimony.—District Court, in setting aside and annulling ICC's order canceling proposed railroad tariffs for want of substantial evidence to support it, exceeded its function in reweighing testimony, and on record before it erred in differing with ICC and agreeing with railroads on impact of new tariffs on railroad revenue. Ralston Purina Co. v. Louisville & N. R. Co., p. 476.

209-904 O - 78 - 63

JURISDICTION. See also **Constitutional Law**, III, 6; **Federal Power Commission.**

1. *District Court—Alien's claim of unconstitutionality of durational residence requirement for Medicare.*—District Court had jurisdiction over claim of unconstitutionality of five-year residence requirement for Medicare asserted by appellee resident alien who did not meet such requirement, since such claim (unlike claims of other appellee aliens who were disqualified from Medicare because of lack of citizenship, nonadmission for permanent residence, and inability to meet five-year residence requirement) squarely raises question of constitutionality of five-year residence requirement. Mathews v. Diaz, p. 67.

2. *United States District Court in Puerto Rico—Enforcement of 42 U. S. C. § 1983.*—United States District Court in Puerto Rico had jurisdiction under 28 U. S. C. § 1343 (3) to enforce provisions of 42 U. S. C. § 1983. Examining Board v. Flores de Otero, p. 572.

JUSTICIABILITY. See **Standing to Sue.**

KING GEORGE II. See **Constitutional Law**, II; **Procedure.**

LABOR. See **Constitutional Law**, I, 1–2; IV, 1; **National Labor Relations Act.**

LAND USE CHANGES. See **Constitutional Law**, III, 11.

LIBERTY RIGHTS. See **Constitutional Law**, III, 2–3, 5–6.

LICENSE FEES ON IMPORTED OIL. See **Trade Expansion Act of 1962.**

LICENSING OF ENGINEERS. See **Abstention**; **Constitutional Law**, IV, 3.

LOUISIANA. See **Boundaries.**

MAINE. See **Constitutional Law**, II; **Procedure.**

MANDAMUS.

Vacation of discovery order.—In circumstances of state prisoners' class action alleging constitutional violations in manner in which members of California Adult Authority and other petitioners determine length of detention and conditions of punishment for convicted offenders, and seeking declaratory and injunctive relief, issuance of writ of mandamus to vacate discovery order for production, without District Court's prior *in camera* inspection, of personnel files of members and employees of Adult Authority and files of every twentieth inmate in each state correctional institution, is inappropriate, particularly since less extreme alternatives for modification of dis-

MANDAMUS—Continued.
covery order were available. Kerr v. United States District Court, p. 394.

MARINE BOUNDARIES. See **Constitutional Law**, II; **Procedure.**

MARYLAND. See **Constitutional Law**, I, 3; IV, 2; V, 1.

MATERIALITY OF OMITTED FACTS IN PROXY SOLICITATION. See **Securities Exchange Act of 1934.**

MAXIMUM HOURS. See **Constitutional Law**, I, 1–2.

MEDICARE. See **Constitutional Law**, III, 6; **Jurisdiction**, 1.

MINIMUM WAGES. See **Constitutional Law**, I, 1–2.

MINNESOTA. See **Indians.**

MIRANDA WARNINGS. See **Constitutional Law**, III, 1.

MISREPRESENTATIONS BY AIR CARRIERS. See **Air Carriers.**

MUNICIPAL CORPORATIONS. See **Constitutional Law**, IV, 1.

MUNICIPAL EMPLOYEES. See **Constitutional Law**, I, 1–2; III, 2–3; IV, 1.

NATIONAL BANKS. See **Banks; Venue.**

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.

Environmental impact statement—Real estate developments.—NEPA's environmental impact statement requirement does not apply so as to require Department of Housing and Urban Development to prepare such a statement before it may allow a disclosure statement filed with it by a private real estate developer pursuant to Interstate Land Sales Full Disclosure Act to become effective. Even if Secretary of HUD's allowing a disclosure statement to become effective constituted "major federal action significantly affecting the quality of the human environment" within meaning of NEPA so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty, since Secretary cannot comply with duty under Disclosure Act to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments. Flint Ridge Dev. Co. v. Scenic Rivers Assn., p. 776.

NATIONAL GUARD TECHNICIANS ACT OF 1968. See **Constitutional Law**, III, 9.

NATIONAL LABOR RELATIONS ACT.

1. *Union- or agency-shop agreement—Effect of state "right-to-work" laws—Job situs test.*—It is employees' predominant job situs rather than a generalized weighing of factors or place of hiring that triggers operation of § 14 (b) of Act authorizing States to exempt themselves from § 8 (a) (3) and to enact "right-to-work" laws prohibiting union or agency shops, and under § 14 (b) right-to-work laws cannot void agreements permitted by § 8 (a) (3) when situs at which all employees covered by agreement perform most of their work is located outside of a State having such laws. Oil Workers v. Mobil Oil Corp., p. 407.

2. *Validity of agency-shop agreement—Seamen—Effect of "right-to-work" laws—Job situs test.*—Under job situs test Texas' right-to-work laws cannot govern validity of agency-shop agreement covering seamen employed on respondent's oil tankers, because most of employees' work is done on high seas, outside territorial bounds of Texas. It is immaterial that Texas may have more contacts than any other State with employment relationship involved, since there is no reason to conclude under § 14 (b) of Act that in every employment situation *some* State's law with respect to union-security agreements must apply, and it is fully consistent with national labor policy to conclude, if predominant job situs is outside boundary of any State, that no State has a sufficient interest in employment relationship and that hence no State's right-to-work laws can apply. Oil Workers v. Mobil Oil Corp., p. 407.

NATIONAL MONUMENTS. See **Water Rights.**

NATIONAL SECURITY. See **Trade Expansion Act of 1962.**

NEBRASKA. See **Banks.**

NEGROES. See **Civil Rights; Constitutional Law,** III, 4, 7.

NEVADA. See **Water Rights.**

NEW HAMPSHIRE. See **Constitutional Law,** II; **Procedure.**

NEW HAMPSHIRE COMMUTERS TAX. See **States.**

NEW JERSEY TRANSPORTATION BENEFITS TAX ACT. See **States.**

NEW MEXICO ESTRAY LAW. See **Constitutional Law,** VI.

NONCITIZENS. See **Constitutional Law,** III, 5.

NOTICE OF OFFENSE. See **Constitutional Law,** III, 8.

NUCLEAR MATERIALS. See **Federal Water Pollution Control Act,** 2–3.

OHIO. See **Constitutional Law**, III, 11.

OIL IMPORTS. See **Trade Expansion Act of 1962.**

ORIGINAL ACTIONS. See **Constitutional Law**, II; **Procedure**; **States.**

OUT-OF-STATE SCRAP PROCESSORS. See **Constitutional Law**, I, 3; IV, 2.

OVERBOOKING OF AIRLINE FLIGHTS. See **Air Carriers.**

PARENS PATRIAE SUITS. See **States.**

PENNSYLVANIA. See **States.**

PERMANENT RESIDENCE. See **Constitutional Law**, III, 6; **Jurisdiction**, 1.

PERSONAL PROPERTY TAXES. See **Indians.**

PERSONNEL TESTS. See **Civil Rights**; **Constitutional Law**, III, 7.

POLICEMEN. See **Constitutional Law**, III, 2–3.

POLICE RECRUITING PROCEDURES. See **Civil Rights**; **Constitutional Law**, III, 4, 7.

POLLUTANTS. See **Clean Air Act**; **Federal Water Pollution Control Act**, 1–3.

PORTSMOUTH HARBOR. See **Constitutional Law**, II; **Procedure.**

POST-ARREST SILENCE. See **Constitutional Law**, III, 1.

POST-CONVICTION RELIEF.

Right to free trial transcript—Restrictions imposed by 28 U. S. C. § 753 (f).—Court of Appeals' judgment holding that respondent federal prisoner was entitled to a free trial transcript to aid him in preparing a post-conviction motion under 28 U. S. C. § 2255 to vacate his sentence and that 28 U. S. C. § 753 (f)—which provides for a free transcript for indigent prisoners asserting a claim under § 2255 if trial judge certifies that asserted claim is "not frivolous" and that transcript is "needed to decide the issue"—does not prohibit courts from requiring Government to supply an indigent prisoner with a free transcript before he files his § 2255 motion, is reversed. United States v. MacCollom, p. 317.

POWER COMPANIES. See **Federal Power Commission.**

PRESERVATION OF FISH. See **Water Rights.**

PRESIDENTIAL PROCLAMATIONS. See **Trade Expansion Act of 1962**; **Water Rights.**

PRETERMINATION HEARINGS. See **Constitutional Law**, III, 2–3.

PRISON AUTHORITIES' PERSONNEL FILES. See **Mandamus.**

PRISONERS. See **Mandamus**; **Post-conviction Relief.**

PRISONERS' PERSONNEL FILES. See **Mandamus.**

PRIVATE COLLEGES. See **Constitutional Law**, V, 1.

PROCEDURE. See also **Abstention**; **Appeals.**

Original action—State boundaries—Consent decree.—In an original action by New Hampshire against Maine to locate certain lateral marine boundary separating States, entry of consent decree embodying States' agreement upon meaning of terms of decree proposes a wholly permissible final resolution of controversy both as to facts and law and comports with Court's Art. III functions. New Hampshire v. Maine, p. 363.

PRODUCTION OF DOCUMENTS. See **Mandamus.**

PROHIBITION AGAINST ALIEN ENGINEERS. See **Abstention**; **Constitutional Law**, IV, 3.

PROPERTY CLAUSE. See **Constitutional Law**, VI.

PROPERTY RIGHTS. See **Constitutional Law**, III, 2–3, 6, 11.

PROPERTY TAXES. See **Indians.**

PROTECTION OF WILDLIFE. See **Constitutional Law**, VI.

PROXY SOLICITATIONS. See **Securities Exchange Act of 1934.**

PUBLIC EMPLOYEES. See **Constitutional Law**, I, 1–2.

PUBLIC LANDS. See **Constitutional Law**, VI.

PUBLIC UTILITIES. See **Federal Power Commission.**

PUERTO RICO. See **Abstention**; **Constitutional Law**, IV, 3; **Jurisdiction**, 2.

RACIAL DISCRIMINATION. See **Civil Rights**; **Constitutional Law**, III, 4, 7.

RADIOACTIVE MATERIALS. See **Federal Water Pollution Control Act**, 2–3.

RAILROAD TARIFFS. See **Interstate Commerce Commission**; **Judicial Review.**

RATE INCREASES FOR RAILROADS. See **Interstate Commerce Commission**; **Judicial Review.**

REAL ESTATE DEVELOPERS. See **Constitutional Law**, III, 11; **National Environmental Policy Act of 1969.**

REASONABLENESS OF RAILROAD RATES. See **Interstate Commerce Commission.**

RECRUITING OF POLICE OFFICERS. See **Civil Rights**; **Constitutional Law**, III, 4, 7.

REFERENDUMS. See **Constitutional Law**, III, 11.

REFUSAL TO WITHHOLD UNION DUES FROM EMPLOYEES' PAYCHECKS. See **Constitutional Law**, IV, 1.

REGULATION OF DISCHARGES OF RADIOACTIVE MATERIALS. See **Federal Water Pollution Control Act**, 2–3.

REGULATIONS OF CIVIL SERVICE COMMISSION. See **Constitutional Law**, III, 5.

RELIGIOUS FREEDOM. See **Constitutional Law**, V, 2–3.

RELIGIOUSLY AFFILIATED COLLEGES. See **Constitutional Law**, V, 1.

REPEALS BY IMPLICATION. See **Venue.**

REQUIREMENTS FOR CONTROL AND ABATEMENT OF AIR POLLUTION. See **Clean Air Act.**

RESERVATION OF WATER RIGHTS. See **Water Rights.**

RESIDENCE REQUIREMENTS FOR MEDICARE. See **Constitutional Law**, III, 6; **Jurisdiction**, 1.

RESIDENT ALIENS. See **Constitutional Law**, III, 5–6; **Jurisdiction**, 1.

REVENUE RULINGS. See **Standing to Sue**, 2.

RIGHTS TO LIBERTY. See **Constitutional Law**, III, 2–3, 5–6.

RIGHTS TO PROPERTY. See **Constitutional Law**, III, 2–3, 6, 11.

RIGHT TO FREE TRANSCRIPT OF CRIMINAL TRIAL. See **Post-conviction Relief.**

RIGHT TO PRETERMINATION HEARING. See **Constitutional Law**, III, 2–3.

"RIGHT-TO-WORK" LAWS. See **National Labor Relations Act.**

RULES OF SECURITIES AND EXCHANGE COMMISSION. See **Securities Exchange Act of 1934**, 2–3.

SABINE RIVER AND LAKE. See **Boundaries.**

SALES OF ELECTRIC ENERGY. See **Federal Power Commission.**

SCHOOL BOARDS. See **Constitutional Law**, III, 10.

SCRAP PROCESSORS. See **Constitutional Law**, I, 3; IV, 2.

SEAMEN. See **National Labor Relations Act.**

SECOND-DEGREE MURDER. See **Constitutional Law**, III, 8.

SECRETARY OF THE TREASURY. See **Trade Expansion Act of 1962.**

SECTARIAN COLLEGES. See **Constitutional Law**, V, 1.

SECULAR LEGISLATIVE PURPOSES. See **Constitutional Law**, V, 1.

SECURITIES EXCHANGE ACT OF 1934. See also **Venue.**

1. *Proxy statement—Materiality of omitted fact.*—Issue of materiality of omitted fact in proxy statement is a mixed question of law and fact, involving as it does application of a legal standard to a particular set of facts, and only if established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment. TSC Industries, Inc. v. Northway, Inc., p. 438.

2. *Proxy statement—Materiality of omitted fact.*—Under standard that a fact omitted from a proxy statement is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote, none of omissions claimed in this case to have been in violation of Rule 14a–9, promulgated under § 14 (a) of Act, were, so far as record reveals, materially misleading as a matter of law, and hence respondent shareholder was not entitled to summary judgment in its action against petitioners claiming that their joint proxy statement recommending approval of proposal to liquidate one petitioner and sell all its assets to other petitioner by exchanging certain stock, was incomplete and materially misleading in violation of § 14 (a) and Rule 14a–9 in that it omitted material facts relating to degree of one petitioner's control over other. TSC Industries, Inc. v. Northway, Inc., p. 438.

3. *Rule 14a–9—Materially misleading proxy statements—Standard of materiality.*—General standard of materiality best comporting with policies of Rule 14a–9 (promulgated under § 14 (a) of Act and providing that no proxy solicitation shall be made "which . . . is false or misleading with respect to any material fact, or which omits

SECURITIES EXCHANGE ACT OF 1934—Continued.

to state any material fact necessary in order to make the statements therein not false or misleading") is not standard applied by Court of Appeals ("all facts which a reasonable shareholder *might* consider important") but is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. TSC Industries, Inc. v. Northway, Inc., p. 438.

SILENCE AT TIME OF ARREST. See **Constitutional Law**, III, 1.

SOCIAL SECURITY ACT. See **Constitutional Law**, III, 6; **Jurisdiction**, 1.

SPECIAL MASTERS. See **Boundaries.**

STANDING TO SUE.

1. *Challenge to standing—Relevant inquiry—Showing of injury—Case or controversy.*—When a plaintiff's standing is challenged relevant inquiry is whether, assuming justiciability of claim, plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision, and unless such a showing is made a federal court cannot exercise its power consistent with "case or controversy" limitation of Art. III of Constitution. Simon v. Eastern Ky. Welfare Rights Org., p. 26.

2. *Suit challenging validity of Revenue Ruling—Denial of hospital services to indigents.*—In class action brought on behalf of all persons unable to afford hospital services by respondents (several low-income individuals and organizations representing such individuals) against petitioners (Secretary of Treasury and Commissioner of Internal Revenue), claiming that Revenue Ruling 69–445 "encouraged" hospitals to deny services to indigents, and was invalid because it was an erroneous interpretation of Internal Revenue Code and had been issued in violation of Administrative Procedure Act, District Court should have granted petitioners' motion to dismiss because respondents failed to establish their standing to bring suit. Simon v. Eastern Ky. Welfare Rights Org., p. 26.

STATE AID TO PRIVATE COLLEGES. See **Constitutional Law**, V, 1.

STATE AIR-POLLUTION-CONTROL PLANS. See **Clean Air Act.**

STATE AND CHURCH. See **Constitutional Law**, V, 1–3.

STATE BANKS. See **Banks.**

STATE BOUNDARIES. See **Boundaries; Constitutional Law, II; Procedure.**

STATE EMPLOYEES. See **Constitutional Law, I, 1–2.**

STATEMENTS OF RECORD CONCERNING LAND DEVELOPMENTS. See **National Environmental Policy Act of 1969.**

STATE PERMITS FOR AIR CONTAMINANT SOURCES. See **Clean Air Act.**

STATE PERMITS FOR WATER POLLUTANT SOURCES. See **Federal Water Pollution Control Act, 1.**

STATE PRISONERS. See **Mandamus.**

STATE "RIGHT-TO-WORK" LAWS. See **National Labor Relations Act.**

STATES.

1. *Action between States—Challenge to commuters' taxes—Lack of direct injuries.*—Motions for leave to file bills of complaint challenging commuters' taxes imposed by defendant States brought by plaintiff States on their own behalf are denied. In neither suit has defendant State directly injured plaintiff States by imposing taxes in question, but injuries to plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures to allow their residents credit for taxes paid to other States. Pennsylvania v. New Jersey, p. 660.

2. *Action between States—Challenge to commuters' taxes—Parens patriae suit.*—Pennsylvania's motion for leave to file suit challenging New Jersey's commuters' tax as *parens patriae* on behalf of its citizens is denied, since such a suit represents nothing more than a collectivity of private suits against New Jersey for taxes withheld from private parties, and no sovereign or quasi-sovereign interests of Pennsylvania are implicated. Pennsylvania v. New Jersey, p. 660.

STATE TAXATION OF INDIANS. See **Indians.**

STRAY HORSES AND BURROS. See **Constitutional Law, VI.**

STRIKES BY PUBLIC EMPLOYEES. See **Constitutional Law, III, 10.**

SUITS AGAINST NATIONAL BANKS. See **Venue.**

SUPREMACY OF FEDERAL GOVERNMENT. See **Constitutional Law, II.**

SUPREME COURT. See also **Procedure; States.**

Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the First Circuit, p. 912.

SUSPENSION OF WRIT OF HABEAS CORPUS. See **Post-conviction Relief.**

TAXATION OF COMMUTERS' INCOME. See **States.**

TAXATION OF INDIANS. See **Indians.**

TEACHERS. See **Constitutional Law,** III, 10.

TERMINATION OF EMPLOYMENT. See **Constitutional Law,** III, 2–3, 9.

TERRITORIES. See **Jurisdiction,** 2.

TEXAS. See **Boundaries; National Labor Relations Act.**

TITLE DOCUMENTATION OF ABANDONED AUTOMOBILES. See **Constitutional Law,** I, 3; IV, 2.

TORTS. See **Air Carriers.**

TRADE ACT OF 1974. See **Trade Expansion Act of 1962.**

TRADE EXPANSION ACT OF 1962.

License fees on imported oil—President's authority.—Section 232 (b) of Act, which provides that if Secretary of Treasury finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," President is authorized to "take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security," authorizes President to issue a Proclamation raising license fees on imported oil after Secretary of Treasury on basis of investigation found that crude oil and its derivatives and related products were being imported into United States in such quantities and under such circumstances as to threaten to impair national security, and accordingly recommended to President that appropriate action be taken to reduce imports. FEA v. Algonquin SNG, Inc., p. 548.

TRANSCRIPTS OF CRIMINAL TRIALS. See **Post-conviction Relief.**

UNAPPROPRIATED WATER. See **Water Rights.**

UNION DUES. See **Constitutional Law,** IV, 1.

UNION-SHOP AGREEMENTS. See **National Labor Relations Act.**

UNITED STATES. See **Water Rights.**

UNIVERSITIES. See **Constitutional Law,** V, 1.

UNREASONABLE DIFFERENCE IN ELECTRIC RATES. See **Federal Power Commission.**

USE OF POST-ARREST SILENCE FOR IMPEACHMENT PURPOSES. See **Constitutional Law,** III, 1.

VENUE.

Suit against national bank—Violation of Securities Exchange Act of 1934.—Venue in a suit against a national banking association charged with violating Securities Exchange Act of 1934 is governed by § 94 of National Bank Act, which provides that an action against a national banking association may be had in any federal district court within district in which such association may be established, rather than by § 27 of Securities Exchange Act, which provides that any action to enforce any liability or duty under that Act may be brought in any district where violation occurred or in district wherein defendant is found or transacts business. Radzanower v. Touche Ross & Co., p. 148.

VIOLATIONS BY BANK OF SECURITIES EXCHANGE ACT OF 1934. See **Venue.**

WATER POLLUTION. See **Federal Water Pollution Control Act,** 1–3.

WATER RIGHTS.

Reservation of water rights in National Monument.—As of 1952 when United States by Presidential Proclamation issued under American Antiquities Preservation Act reserved as a National Monument Devil's Hole, a deep cavern on federal land in Nevada containing an underground pool inhabited by a unique species of desert fish, United States acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain level of underground pool to preserve its scientific value and thereby implement Presidential Proclamation. Cappaert v. United States, p. 128.

WELFARE BENEFITS. See **Constitutional Law,** III, 6; **Jurisdiction,** 1.

WHOLESALE ELECTRIC RATE INCREASES. See **Federal Power Commission.**

WILD FREE-ROAMING HORSES AND BURROS ACT. See **Constitutional Law,** VI.

WILDLIFE. See **Constitutional Law,** VI.

WISCONSIN. See **Constitutional Law,** III, 10.

WITHHOLDING OF UNION DUES FROM PAYCHECKS. See **Constitutional Law,** IV, 1.

WORDS AND PHRASES.

1. *"Adjust."* § 232 (b), Trade Expansion Act of 1962, 19 U. S. C. § 1862 (b) (1970 ed., Supp. IV). FEA v. Algonquin SNG, Inc., p. 548.

2. *"Objects of historic or scientific interest."* 16 U. S. C. § 431 (American Antiquities Preservation Act). Cappaert v. United States, p. 128.

3. *"Pollutants."* 33 U. S. C. § 1362 (6) (1970 ed., Supp. IV) (Federal Water Pollution Control Act). Train v. Colorado Pub. Int. Research Group, p. 1.

4. *"Requirements respecting control and abatement of air pollution."* § 118, Clean Air Act, 42 U. S. C. § 1857f. Hancock v. Train, p. 167.

5. *"Requirements respecting control and abatement of pollution."* § 313, Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. § 1323 (1970 ed., Supp. IV). EPA v. California ex rel. State Water Resources Control Board, p. 200.

WRIT OF MANDAMUS. See **Mandamus.**

ZONING REFERENDUMS. See **Constitutional Law**, III, 11.

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